(26,219)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 752.

LOUIS H. PERLMAN, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1917.

Petition of Louis H. Perlman, Dated July 19, 1917.

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
THE FIRESTONE TIRE & RUBBER COMPANY,
Defendant.

The petition of Louis H. Perlman respectfully shows to this Court:

1. Your petitioner is a citizen of the United States and resides at 1988 Madison Avenue, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York.

2. Petitioner is fifty-six years of age, and is the inventor of a useful device known in the market as a demountable rim, the purpose of the device being to mount and carry an inflated pneumatic tire upon a metallic rim, which contains locking devices for attachment to the wheels of automobiles and other vehicles. The invention and device referred to is fully covered by Letters Patent which were issued to this petitioner by the United States Patent Office on February 4th, 1913. The letters patent bear the number 1,052,270 of said United States Patent Office.

3. Subsequent to the granting of the letters patent to this petitioner and particularly during September or October, 1913, petitioner instituted an action in this Court against the Standard Welding Company as defendant, and charged in said action that said Standard Welding Company was infringing the patent which was issued to petitioner. The Standard Welding Company appeared in the action so instituted by this petitioner and raised issue to the charge made by petitioner.

4. The issues came on for trial before the Hon. Wm. H. Hunt, District Judge, then sitting in this court. The issues were fully tried in open court by Judge Hunt, and resulted in a decree in favor of this petitioner as plaintiff. By that decree the letters patent issued to petitioner and known as No. 1,052,270 were found and held to be valid and infringed by the Standard Welding Company.

5. During the trial of the cause so instituted by petitioner against the Standard Welding Company, a number of exhibits were offered by this petitioner, and used in connection with the trial of the issues in that action. These exhibits are referred to and set forth in the schedule which petitioner annexes hereto as a part of this petition, and to which reference is hereinafter made herein.

6. The Standard Welding Company appealed to the Circuit Court of Appeals for the Second Circuit from the decree entered by Judge Hunt. The Court of Appeals affirmed Judge Hunt's decree without modification. The opinion written by Judge Hunt at the conclusion of the trial is reported in Vol. 231,

Federal Reporter, page 453, and the decision of the Court of Appeals affirming the decree made by Judge Hunt is reported in Vol. 231, Federal Reporter at page 734.

7. The exhibits which are set forth in Schedule A were at the time when they were offered in the trial of the case against the Standard Welding Company, and now are, the personal property of this petitioner. These exhibits were continuously in the possession and control of this petitioner or those who represented this petitioner.

8. After the trial of the action instituted against the Standard Welding Company petitioner associated himself with others in the organization of a corporation which was known as the Perlman Rim Corporation. That corporation undertook among other things, to market and manufacture and sell the device covered by the letters patent so granted to petitioner as above set forth.

9. During March, 1916, your petitioner assigned and transferred the letters patent so granted to him as above set forth and known as No. 1,052,270, to the Perlman Rim Corporation which corporation is now the owner of the letters patent so far as this petitioner knows or has been advised. The assignment to the Perlman Rim Corporation covered the letters patent and did not cover and never intended to cover the exhibits which were used in the trial of the action instituted against the Standard Welding Company as above set forth.

10. During February, 1917, the Perlman Rim Corporation, being advised that the defendant in this

cause was infringing upon its rights in connection with the manufacture and sale of the devices covered by the letters patent No. 1,052,270, commenced this cause against the defendant for the purpose of obtaining a decree to restrain the defendant from continuing its infringement of the rights of the Perlman Rim Corporation. The defendant joined issue to the complaint in this cause, and the charges therein contained. These issues came on for trial before the Hon. Learned Hand, District Judge, on June 4th, 1917. The trial lasted for several days, and after a final submission of the evidence adduced in that cause, the Perlman Rim Corporation through its counsel applied to the Court for leave to discontinue the action, and for a dismissal of its bill of complaint without prejudice. The Court granted the application to discontinue the action against the defendant herein, but imposed as conditions that the evidence taken in this cause be perpetuated; also that the exhibits offered in the course of the trial as far as the trial had proceeded, be impounded in the custody of the clerk of this court and to be kept by the clerk under seal, subject to the Court's order. All of the exhibits which were offered in the course of the trial of this cause before Judge Learned Hand were the exhibits set forth in Schedule A which is annexed hereto as part hereof, and were the same exhibits as were used in the trial of the issues in the action which was tried before Judge Hunt, and wherein this petitioner was plaintiff and the Standard Welding Company was defendant.

11. In the action which petitioner brought against the Standard Welding Company there were offered more exhibits than those which are set forth in Sched-

ule A. Petitioner however makes no reference to any of the exhibits except those set forth in Schedule A annexed hereto, because only those exhibits set forth in Schedule A are the exhibits which the Court directed to be impounded in the custody of the clerk of this court. None of the exhibits, however, which were offered during the trial of the issues before Judge Hand which are set forth in Schedule A are other than the exhibits which were offered in the trial of the issues in the action against the Standard Welding Company wherein petitioner was plaintiff.

12. Petitioner states directly and positively that every one of the exhibits set forth in Schedule A annexed hereto was offered as an exhibit in the trial of the issues in this cause. Every one of those exhibits were by the decree entered under the direction of Judge Hand, ordered to be impounded in the custody of the clerk of this court. Every one of those exhibits are the personal property of and belong to this petitioner. Petitioner was a witness in the trial of this cause. He was not a party plaintiff nor a party defendant in this cause. He appeared in this action only as a witness in connection with the plaintiff's bill of complaint, and produced from his personal possession and from the possession of persons who held the same with the petitioner's permission, all the exhibits which were offered and admitted upon the trial before Judge Hand, these exhibits being the same as are set forth in Schedule A annexed hereto.

13. On July 17th, 1917, petitioner went to the office of Mr. John Thomas Smith, the solicitor of record and the attorney for the Perlman Rim Corpora-

tion, the plaintiff herein. Petitioner went to Mr. Smith's office in connection with matters not connected with this cause, and in the course of conversation Mr. Smith, the attorney for the Perlman Rim Corporation, told petitioner that he had been served with an order signed by Judge Learned Hand which directed Mr. Smith as attorney for the complainant herein, and also directed the attorney for the defendant herein to show cause before Judge Learned Hand at his Chambers during July 17th, 1917, why the United States Attorney in and for the Southern District of New York should not have and be given the possession, control and custody of the exhibits offered during the trial of this action in connection with a proceeding which the United States Attorney had instituted upon an investigation which involved the question whether petitioner had committed an offense against the laws of the United States in the course of the trial of the issues herein. Mr. Smith told petitioner that the attorney for the defendant had not appeared before Judge Hand in connection with the order to show cause, and that he had not opposed the entry of an order granting unto the United States Attorney the possession and custody of all of the exhibits offered upon the trial of the issues in this action before Judge Learned Hand.

14. The exhibits offered upon the trial are the exhibits which are set forth in Schedule A. The order to show cause referred to by Mr. Smith, is one entitled in a proceeding involving an investigation by the Grand Jury sitting in and for the Southern District of New York against this petitioner upon an inquiry whether he had in the course of the trial be-

fore Judge Learned Hand committed an offense against the laws of the United States. Petitioner was told by Mr. Smith that he appeared but did not oppose the granting of the custody of the exhibits to the United States Attorney, and that the order thereon would be entered as a matter of course.

15. Petitioner now submits to this court that the private property and personal property of this petitioner, and consisting of the exhibits set forth in Schedule A have been directed by the Court to be impounded in the custody of the clerk of this court, without due regard to the rights of this petitioner as the owner of said exhibits. Petitioner also submits that the United States Attorney in and for the Southern District of New York is about to use said exhibits or some of them as set forth in Schedule A in connection with a proceeding which has been instituted against this petitioner.

16. The application by the United States Attorney for the custody and possession of the exhibits set forth in Schedule A is entitled in this court, and is in the matter "of the inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C. by Louis H. Perlman."

17. The Louis H. Perlman referred to in the title of said proceedings is this petitioner. The application was based upon the affidavit of Mr. Harold Harper, an assistant United States Attorney, and in his affidavit Mr. Harper referred to this cause and testimony given by this petitioner therein. Among other things, Mr. Harper, the Assistant United States Attorney, sworn on the application for the custody and possession of said exhibits, as follows:

"Deponent (Mr. Harper) is informed and verily believes that the exhibits in said cause were impounded in accordance with the said decree (referring to the decree made by Judge Hand); that the said exhibits (being those set forth in Schedule A annexed hereto) as deponent is informed and believes, are material and necessary to the Grand Jury for the investigation in which they are engaged as aforesaid.

"Deponent (Mr. Harper) asks therefore, an order of the Court directing the clerk to produce the exhibits before the Grand Jury and permitting the United States Attorney such access to the exhibits as may be necessary for the proper presentation of the matter to the Grand Jury, or for the preparation for trial in case an indictment shall be found."

18. Petitioner submits that the use of the exhibits set forth in Schedule A, the personal property and belongings of this petitioner by the Grand Jury and by the United States Attorney as now contemplated are in violation of the rights of this petitioner and are unwarranted at law. Petitioner never consented to any disposition of the exhibits referred to in Schedule A, and therein set forth. Petitioner has always retained and now retains title and ownership of all of said exhibits. Petitioner submits that he is entitled to the control and custody of all of said exhibits. These exhibits were impounded by the Court in a suit to which this petitioner was not a party. Petitioner was not heard in person or by counsel representing him upon the application to impound the exhibits set forth in Schedule A, and never consented to part with the possession, control or custody of said exhibits.

19. Petitioner now asks that an order be granted directing the attorney for the plaintiff herein, Mr. John Thomas Smith, the attorneys for the defendant herein, Charles P. Neave, and the United States Attorney for the Southern District of New York, to show cause before this court at the earliest, opportune moment why an order should not be made directing the clerk of this court to deliver to this petitioner all the exhibits set forth in Schedule A, his personal property and belongings, and why in the meantime the United States Attorney and his assistants should not be restrained and enjoined from using any of said exhibits set forth in Schedule A in any proceeding or inquiry before the Grand Jury of the United States or before any other court or investigating body.

20. Petitioner asks that an order to show cause be granted for the reason that he desires in connection with this application a stay of proceedings against the United States Attorney in and for the Southern District of New York. Unless such a stay is granted, and an immediate hearing had upon this application, the personal rights of this petitioner will be seriously invaded in that by the use of the exhibits set forth in Schedule A, petitioner is being compelled without a hearing, to furnish evidence against himself in a criminal proceeding, all without due process of law.

21. That no other or previous application for any order in the premises with respect to the exhibits, has been made to any Judge or Court.

Dated, New York, July 19th, 1917.

LOUIS H. PERLMAN,
Petitioner.

United States of America,
Southern District of New York, } ss:
City and County of New York,

Louis H. Perlman, being duly sworn, deposes and says; that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

LOUIS H. PERLMAN.

Sworn to before me this
19th day of July, 1917.
Minnie H. Bunge,
Notary Public,
Kings County.
Cert. filed in New York County.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
THE FIRESTONE TIRE & RUBBER Co.,
Defendant.

Schedule A.

4. Wheel procured from Mr. Eames:

5. Rim carrying tire for Exhibit 4:

6. Rim carrying tire for Exhibit 4;

7. Bronze Model of rim;

8. Consolidated Chandilier Co. bill to Perlman, dated 7/1/03;

9. Receipt Consolidated Chandilier Co., dated July 16, 1903;

10. Bill Consolidated Chandilier Co. to Perlman, dated Aug. 1, 1903;

11. Letter Consolidated Chandilier Co. to Perlman, dated March 2, 1903;

12. Bill, Consolidated Chandilier Co. to Perlman, dated April 1, 1904;

13. Consolidated Chandilier Co. letter to Perlman (receipt), dated May 1, 1904;

14. Bill, Consolidated Chandilier Co. to Perlman, dated Feb. 1, 1905;

15. Certified copy of license dated August 18, 1904, on Royal Car;

16. Application of license, dated Oct. 12, 1904;

17. Side clamps designed by Perlman and made at shop of Consolidated Chandilier Co. between March and April, 1903, used with Exhibits 5 and 6;

18. Perlman Short Stem Lug, Spreader and Attachment. Type of 1903.

19. Correspondence between Standard Welding Co. and L. H. Perlman between June, July and August;

21. Wheel of 1904;

22. Sample type of wheel furnished Consolidated Chandilier Co.;

24. Sectional model;

25. Section of standard type of clincher rim;

28. Plaintiff's Q-D demountable rim which is covered by Consolidated Chandelier Co. bill of Feb. 1, 1905;

29. Red wheel;

39. Radial bolt;

40. Bolt;

41. Bolt;

42. Bolt;

43. Bolt;

57. Threaded bolt with circular opening through center;

58. Represents center punch used in making Perlman rim;

59. Perlman correspondence with Mason, Fenwick & Lawrence;

61. Box & cover which had contained tools;

62. Tag which accompanied tools from Consolidated Chandelier Co.;

63. Hollow milling tool;

64. Hollow milling tool to form conical tip;

65. Tapered reamer tool for finishing ream holes in a tapered form;

66. Another reamer tapered to do same work as Ex. 65 with a co-operating collar;

67. Counterpart of Ex. 65 with broken edge;

68-69. Stop collars to be applied to entrance of reamers to determine depth;

70-71. Tapered counter boring collars; reamers;

72. Form of drill exhibited in standard case to illustrate drill, ground to taper formation;

76. Perlman's check to Mr. Vick on account of purchase of Royal Car;

77. Check dated Sept. 16, 1904, payable to Welch Motor Car Co;

78. Check dated Oct. 7, 1904, payable to Welch Motor Car Co;

79. Wooden plug;

100. Patent in suit, 1,052,270, dated Feb. 4, 1913;

102. Defendant's wheel containing split ring;

103. Defendant's detached lugs.

Order to Show Cause.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
THE FIRESTONE TIRE & RUBBER COMPANY,
Defendant.

Upon the annexed petition of Louis H. Perlman, dated and verified July 19th, 1917, let John Thomas Smith, Esq., the attorney for Perlman Rim Corporation, the plaintiff herein, Charles P. Neave, Esq., the attorney for the Firestone Tire & Rubber Company, the defendant herein; Francis G. Caffey, Esq., United States Attorney, show cause before this court at the U. S. Court House on August, 9th, 1917, at ten A. M., of said day, why an order should not be made herein directing the clerk of this court to surrender and deliver to Louis H. Perlman all the exhibits of-

fered for the plaintiff in this action and which were directed to be impounded and deposited with the clerk of this court, by a decree entered herein on June 11th, 1917, and why an order should not be made restraining and enjoining the United States Attorney from using or taking into his possession or custody or control any of the exhibits so offered by the plaintiff in this action, upon the trial herein, and set forth in Schedule A annexed to the petition in connection with an inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C., by Louis H. Perlman, or in any other criminal proceeding against Louis H. Perlman, and why such other and further order in the premises should not be made as may be just and proper.

I direct that in the meantime and until the determination of this application, the United States Attorney and the attorneys for the parties to this action, are hereby severally enjoined and restrained from using any of the exhibits offered by or for the plaintiff in this action upon the trial herein, and set forth in Schedule A annexed to the annexed petition in any proceeding now pending before the Grand Jurors of the United States and in connection with which Louis H. Perlman is a party.

I direct hereby that service of a copy of this order and the annexed petition upon John Thomas Smith, the attorney for the plaintiff herein, Charles P. Neave, the attorney for the defendant herein, and the Hon. Francis G. Caffey, the United States Attorney, on July 23rd, 1917, be deemed good and sufficient service.

Dated, New York, July 19th, 1917.

LEARNED HAND,
United States District Judge.

Affidavit of Harold Harper.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
FIRESTONE TIRE AND RUBBER COMPANY,
Defendant.

IN THE MATTER
of
The Inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C. by LOUIS H. PERLMAN.

Southern District of New York, ss:

Harold Harper, being duly sworn, says that he is an Assistant United States Attorney for the Southern District of New York, and is familiar with the criminal proceedings herein.

On June 4th, 1917, there came on for trial in the United States District Court for the Southern District of New York, a certain suit in equity entitled as above, and hereafter referred to as the Firestone suit. On June 7th, 1917, Louis H. Perlman, above-

mentioned, appeared and was sworn as a witness in that suit. The Firestone suit was brought to restrain the defendant corporation from infringing a patent issued to Perlman and by him assigned to the plaintiff corporation. Perlman testified (S. M., page 184) that he had been president of the plaintiff corporation since its formation in March, 1916, and that he was the patentee under Patent No. 1,052,270 in suit. The patent purported to cover a certain improvement in wheels, that is to say, a certain facility for removing and replacing a demountable tire rim from the rim of a wheel. Perlman proceeded to give testimony in respect to the alleged invention by him, which was the subject of the patent. In the course of such testimony he produced, and there was offered in evidence on the part of the plaintiff corporation, the exhibits which are the subject of this motion. Upon the conclusion of Perlman's testimony the plaintiff moved for a dismissal of the suit. This motion was granted by Judge Learned Hand, who presided, after considerable debate, including discussion as to the disposition to be made of the exhibits. Judge Hand finally directed that the exhibits should be impounded in the custody of the clerk. This was embodied in the final decree, dated June 11, 1917, to which deponent begs leave to refer.

Perlman, as deponent is informed and believes, was present during practically all of the proceedings of the trial, including the discussion above referred to and the direction of Judge Hand that the exhibits be impounded. So far as the minutes show, no protest was made by him that the exhibits should not be impounded, that they were his property. So far as deponent has been able to ascertain, no such protest

was made by Perlman until the order permitting the United States Attorney an inspection of these minutes, hereafter referred to, was made.

Certain of the alleged perjuries committed by Perlman refer directly to the exhibits in question, as to the time and manner of their production or alteration; and certain other statements alleged to have been perjured were made by the said Perlman and supported by the exhibits then shown to the Court. The said exhibits are, in deponent's opinion, material and necessary to the investigation by the Grand Jury, whether in fact perjury was committed in such connection and to the proof of such perjury upon trial, if such investigation shall result in a true bill being found by the Grand Jury.

On the 18th day of July, 1917, the Honorable Learned Hand, District Judge, duly made an order permitting the United States Attorney and the Grand Jury to have access to these exhibits then and now impounded in the custody of the clerk by decree of June 11, 1917, in the Firestone suit. Deponent begs leave to refer to this order, which was obtained upon an order to show cause served upon the attorneys for the plaintiff and defendant in the Firestone suit and concerning which deponent notified Mr. Charles H. Griffiths, who represented Louis H. Perlman, in the criminal proceedings, by telephone.

In the course of his cross-examination Perlman gave certain evidence with regard to certain events in England in the year 1895, which did not directly concern the matter of the invention but went to the credibility of the witness as such. With respect to these statements the Grand Jury attending this court

for the July term found an indictment against Perlman for perjury, on July 20, 1917.

The sources of deponent's information and the grounds of his belief as to the above matters not within his own knowledge are the official stenographic report of the Firestone suit, the records of the clerk's office, and statements made to deponent by persons present in the court room during the trial of the Firestone suit and cognizant of the proceedings in that case.

HAROLD HARPER.

Sworn to before me this
9th day of August, 1917.
Carl Brecher,
Notary Public,
Bronx Co. No. 72.
Certificate filed in N. Y. Co. No. 477.
Register's No. Bronx Co. No. 969.
Register's No. N. Y. Co. No. 9041.
My Commission Expires Mar. 30, 1919.

(Seal.)

Order, Dated July 18th, 1917.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Woolworth Building, in the Borough of Manhattan, City of New York, on the 18th day of July, 1917.

Present: Hon. Learned Hand, District Judge.

IN THE MATTER

of

The Inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C. by LOUIS H. PERLMAN.

The United States Attorney having moved this Court for an order directing the clerk to produce before the Grand Jury certain exhibits in the suit entitled Perlman Rim Corporation vs. Firestone Tire & Rubber Company, and for other relief, the said motion having come on to be heard;

Now, upon reading and filing a certain order to show cause, dated the 14th day of July, 1917, with due proof of the service thereof upon John Thomas Smith and Charles C. Neave, respectively the attorneys for the plaintiff and defendant in the said suit, and the affidavit of Harold Harper, an Assistant United States Attorney, verified the 13th day of July, 1917, in support of said motion, and the said John

Thomas Smith appearing upon the hearing of said motion and not opposing, and due deliberation having been had, it is, on motion of Francis G. Caffey, United States Attorney,

Ordered, that the clerk of this court produce before the Grand Jury attending this term of court and before any Grand Jury attending a subsequent term thereof upon such day or days as shall be requested of him by the United States Attorney, the exhibits heretofore sealed and impounded in the suit of Perlman Rim Corporation vs. Firestone Tire and Rubber Company by a decree granted therein on the 11th day of June, 1917, and that the said clerk permit the said United States Attorney and his assistants to have access to the said exhibits at all reasonable times for the purpose of presenting to the Grand Jury certain matters relating to the above inquiry and of preparing for trial in the event that a true bill shall be found by the Grand Jury, and that the United States Attorney may have such temporary custody of the said exhibits, or any part thereof, as may be necessary for the purposes aforesaid, under such regulations as the clerk may make respecting their said custody.

LEARNED HAND,
U. S. District Judge.

Decree.

(Copy.)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION, against THE FIRESTONE TIRE & RUBBER COMPANY.	E 14-103. In Equity

This cause having come on to be heard and testimony having been taken by both parties, now, on plaintiff's motion, and after hearing defendant's counsel in opposition thereto, it is

Ordered, that the bill of complaint herein be and it hereby is dismissed without prejudice with costs to defendant to be taxed; and as a condition of such dismissal and in accordance with plaintiff's stipulation made in open court, it is

Further ordered, that the minutes of the trial be filed and that all the exhibits offered by either party be impounded and deposited with the clerk of this court under seal to be opened only by order of court on notice to each of the parties hereto; and

That, all testimony taken up to the present time in this cause (as well as the exhibits) shall stand as testimony which may be read and used in any cause between the parties hereto or between any other par-

ties who would be privies if judgment were entered herein, including cases in which the vendees and users of the rims made or sold by the defendant or such other parties are sued.

Dated, June 11, 1917.

LEARNED HAND.

Approved:
John T. Smith,
For Plaintiff.
Approved as to form:
Charles Neave,
For Defendant.

Order, Dated September 22, 1917.

At a Stated Term of the United States District Court, for the Southern District of New York, held at the United States Court and Post Office Building in the Borough of Manhattan, City of New York, on the 22nd day of September, 1917.

Present: Hon. Martin T. Manton, United States District Judge.

PERLMAN RIM CORPORATION,
Plaintiff,

against

FIRESTONE TIRE AND RUBBER COMPANY,
Defendant.

IN THE MATTER

of

The Inquiry by the Grand Jurors of the United States into certain violations of Section 125 U. S. C. C. by LOUIS H. PERLMAN.

Louis H. Perlman having applied to this court for an order directing the return and surrender to him of the exhibits offered by the plaintiff upon the trial

of the cause wherein Perlman Rim Corporation was plaintiff and the Firestone Tire and Rubber Company was defendant, and for a further order restraining and enjoining the United States Attorney in and for the Southern District of New York, from using before any Grand Jury of the United States or taking into his possession or custody said exhibits upon the claim and for the reason that such taking or use would be in violation of the rights of said Louis H. Perlman as guaranteed to him by the Constitution of the United States and the Fourth and Fifth Amendments thereof in that such taking or use would be and constitute an unreasonable search and seizure of the papers and effects of said Louis H. Perlman and also that said Louis H. Perlman would by such taking or use be compelled in a criminal cause to be a witness against himself.

Now, upon reading and filing the order to show cause, dated July 19, 1917, signed by the Hon. Learned Hand, District Judge, the petition of Louis H. Perlman, verified the 19th day of July, 1917, in support of said motion, and the affidavit of Harold Harper, Esq., verified the 9th day of August, 1917, in opposition thereto, and after hearing Silberberg & Davis, Esqs., in support of said application, and Harold Harper, Esq., Assistant United States Attorney, in opposition thereto, and counsel for the said Louis H. Perlman having withdrawn from the consideration of the Court so much of the application as related to the return to him of the exhibits and having limited the application without prejudice to the order that the United States Attorney be enjoined from using or taking said exhibits, or presenting or permitting the

same to be presented to any United States Grand Jury and due deliberation having been had;

It is, on motion of Francis G. Caffey, Esq., United States Attorney for the Southern District of New York,

Ordered, adjudged and decreed, that the said motion be, and the same hereby is, in all respects denied.

MANTON,
U. S. D. J.

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION, Plaintiff, against FIRESTONE TIRE AND RUBBER COMPANY, Defendant.	#139.

Silberberg & Davis, of New York City, for L. H. Perlman.

Harold Harper, Asst. U. S. Attorney.

MANTON, D. J.:

Louis H. Perlman, a witness in the above-entitled action, asks this Court to prevent the use before the

United States Grand Jury, of his property which were offered in evidence as exhibits, by the plaintiff on the trial of this action, and which were impounded in the clerk's custody. After a trial, on application of the plaintiff, this action was discontinued, one of the conditions imposed being that the exhibits, including the exhibits in question, be impounded with the clerk of the court. Perlman has been arrested and held for the Grand Jury on the charge of perjury in this litigation. His petition now asks (first) that his exhibits be returned to him and, (second) that the District Attorney be restrained from using the exhibits before the Grand Jury. He has abandoned the first request and insists upon the second in this application. His contention is, that to permit the use of these exhibits under the circumstances, would be a violation of the fourth and fifth amendments of the Constitution. The fourth amendment reads:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fifth Amendment reads:

"nor shall any person be compelled in any criminal cause to be a witness against himself."

As to the claim of a violation of the Fourth Amendment, unless the direction of the Trial Judge that the exhibits be impounded with the clerk, amounts to an unreasonable seizure of the applicant's property, the

grand jury cannot be foreclosed from seeing and using the exhibits. Assuming that the exhibits are Perlman's, he appeared in court with them and consented to their introduction in evidence, making them a matter of public record in this litigation then on trial. He disclaims interest in the litigation, saying that he is not a party plaintiff or defendant, but he was interested to the extent of being a witness only and to permitting his exhibits to be used without objection. His testimony upon that trial has resulted in a grand jury investigation as to its truth or falsity, and now he endeavors to avoid an indictment, as his counsel frankly admitted on the argument, by attempting to forbid the use of these exhibits. The cases cited by learned counsel are cases where officers of the law made search and seizure which were held to be unreasonable and which were, in many cases, within the sanctity of the home of the petitioner.

In the case of Weeks v. U. S. (332 U. S., 383), a marshal entered the house of the accused and under color of his office, undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action.

In Flag v. U. S. (233 Fed., 481), the defendant was arrested at his place of business in 40th Street and his books and papers were seized. There was no warrant or procedure of any kind, either of arrest or of search, issued against him.

In U. S. v. Abrams (230 Fed., 313), papers were taken from the defendants by officials of the United States acting under the color of their office.

In U. S. v. Mounday (208 Fed., 187), there was a seizure of the papers.

Examining the authorities, indicates that the test is the manner in which the property was obtained and not the mere fact that the accused has the title to the property or exhibits in question. So, unless there has been an unreasonable search and seizure of the exhibits in question, they may be retained and offered against him before the grand jury.

Concerning the power of the Trial Court to impound exhibits for use, Judge Sanborn in U. S. v. M'Hie (19[illegible] Fed., [illegible]), said:

"Very little authority upon the question of the impounding power has been cited. * * * But the power most clearly exists from the necessities of the situation in analogy to that underlying the subpoena *duces tecum*."

Judge Hand, when he impounded these exhibits, must have concluded that they be kept so as to serve the ends of justice in the light of what occurred at the trial, and that they should be kept until justice had taken its course. They, therefore, should be retained in the possession and hands of the officers of the law. These articles, in the hands of a third person, would surely be subject to the rights of a subpoena *duces tecum* to produce them before a grand jury. Under the order of Judge Hand, they are rightfully in the possession of the Clerk of the court and counsel for the petitioner practically concedes this when he abandons his application for the return of the property.

Since they are, therefore, rightly within the hands of the officer of the court, may they not then be produced by an order of the Court for use before the grand jury, just as they may be subpoenaed under due

process of law for use before the grand jury? Their possession by an officer of the law has been obtained peacefully and by order of the Court and not by any unreasonable search or seizure. Indeed, the papers on this application indicate that when they were impounded with the clerk of the court in the above entitled action, there was no protest on the part of the petitioner.

The cases relied upon by the applicant do not help this petitioner.

The case of U. S. v. Wong Quong Wong (94 Fed., 832), is one where the Government produced the letters written in Chinese which were handed by the defendant to an employee of the Government, who in turn passed them to the Custom officials, who opened and kept them, and then offered them in evidence, and it was there held, by the District Judge, that there was an unreasonable seizure. His language being:

"They are objected to as having been procured by unreasonable seizure, if the mode of acquiring them as attempted to be shown is true, and as not being shown to have come from the appellants if it is not true. The fourth amendment to the Constitution of the United States declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated'; and the fifth, among other things, that no person 'shall be compelled in any criminal case to be a witness against himself.'

* * * * *

"The opening of the envelopes, and taking these letters from them, was a seizure of paper of the appellants that was unreasonable and contrary to the

spirit of these amendments; and such papers, procured in that way, cannot be used in evidence against persons from whom they are procured without violating the protection afforded by the amendments to all persons in this country."

But to grant the relief sought here would be analogous to forbidding the use of a pistol as an exhibit, found in a slayer's hand by an eyewitness at the time of a homicide, if it were committed within the four walls of a court room in the presence of the Court and the officers of the law were given possession of it by the presiding judge and directed to impound it for future use.

The motion will be denied.

Dated, August 11, 1917.

MANTON,
U. S. D. J.

Petition for Appeal and Allowance.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
THE FIRESTONE TIRE & RUBBER COMPANY,
Defendant.

IN THE MATTER
of
The Inquiry by the Grand Jurors of the United States in tain alleged violations of Section 125 U. S. C. C., by LOUIS H. PERLMAN.

Louis H. Perlman, feeling aggreived by the order of this Court made on the 22nd day of September, 1917, by the Honorable Martin T. Manton, District Judge, and entered in the office of the Clerk of this court on the 22nd day of September, 1917, comes now, by Messrs. Silberberg & Davis, his attorneys, and hereby appeals from said order to the Supreme Court of the United States and petitions this Court for an order allowing the said Louis H. Perlman to prosecute said appeal to the Supreme Court of the

United States, under and according to the Laws of the United States in that behalf made and provided and that a transcript of the record and proceedings and papers, upon which said order was made, duly authenticated, may be sent to said Supreme Court of the United States and also that an order be made fixing the amount of security said defendant shall give and furnish upon said appeal and that upon the giving of such security all proceedings on behalf of the United States Attorney be suspended and stayed until the determination of said appeal by the Supreme Court of the United States or until the further order of the Court in the premises.

And your petitioner will ever pray.

SILBERBERG & DAVIS,
Attorneys for Louis H. Perlman.

The foregoing appeal prayed for is hereby allowed upon the appellant filing a bond for $250.00 securing the costs of the United States and all proceedings of the United States Attorney in connection with his taking possession of or using before any Grand Jury of the United States or otherwise of any of the exhibits offered in the cause wherein Perlman Rim Corporation was plaintiff and Firestone Tire & Rubber Company is defendant be and the same is hereby suspended and stayed until after the determination and decision by the Supreme Court of the United States of the appeal from said order.

Dated, New York, September 22nd, 1917.

MANTON,
District Judge.

Petition for Writ of Error.

UNITED STATES DISTRICT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS H. PERLMAN,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

In

PERLMAN RIM CORPORATION,
Plaintiff,

against

FIRESTONE TIRE and RUBBER COMPANY,
Defendant.

IN THE MATTER

of

The Inquiry by the Grand Jurors of the United States into certain violations of Section 125 U. S. C. C., by LOUIS H. PERLMAN.

Louis H. Perlman, petitioner, as plaintiff-in-error respectfully shows:

That he made application to the United States District Court, in and for the Southern District of New York for an order enjoining and restraining the United States Attorney in and for the Southern District of New York from taking into his possession or custody and from using before any grand jury of the United States, or otherwise of certain exhibits offered for and by the Perlman Rim Corporation in a cause wherein Perlman Rim Corporation was plaintiff and Firestone Tire and Rubber Company was defendant. That the application was heard and by this Court denied. That the final order and decree entered upon the application so made is dated September 22nd, 1917. That the application was based upon a claim by said Louis H. Perlman that the taking and use by the United States Attorney, in and for the Southern District of New York of the aforesaid exhibits, and the like use of said exhibits by or before the grand jury of the United States were all in violation of the rights and prerogatives of said Louis H. Perlman as guaranteed to him by the Constitution of the United States and the Fourth and Fifth Amendments thereof, in that such taking or use would be and constitute an unreasonable search and seizure of the papers and effects belonging to said Louis H. Perlman, and that also Louis H. Perlman would by such taking or use be compelled in a criminal cause to be a witness against himself. That the application so made involved the construction and application of the Constitution of the United States and some part or portion thereof.

That Louis H. Perlman feels aggrieved by the order so entered on September 22nd, 1917, and submits that

the matter is one proper to be reviewed by the Supreme Court of the United States upon writ of error.

The petitioner, Louis H. Perlman does, therefore, pray that a writ of error be allowed him herein, directing the Clerk of the United States District Court in and for the Southern District of New York to send the record and proceedings herein with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the Assignment of Error herewith filed by the plaintiff-in-error above named may be reviewed and, if error found, corrected according to the laws and customs of the United States.

Dated, New York, September, 24, 1917.

LOUIS H. PERLMAN,
Plaintiff-in-Error.
By SILBERBERG & DAVIS,
His attorneys,
Office and Post Office Address,
256 Broadway,
Borough of Manhattan,
City of New York.

The foregoing petition is granted and a writ of error allowed as prayed for and the stay heretofore granted on September 22nd, 1917, be, and the same is hereby continued, a bond and undertaking in the sum of $250.00 having been filed with the Clerk of this court.

MANTON,
District Judge.

Writ of Error.

UNITED STATES DISTRICT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS H. PERLMAN,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

In

PERLMAN RIM CORPORATION,
Plaintiff,

against

FIRESTONE TIRE and RUBBER COMPANY,
Defendant.

IN THE MATTER

of

The Inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C., by LOUIS H. PERLMAN.

The President of the United States, the Honorable the Judges of the United States District Court, in and for the Southern District of New York:

Because in the record and proceedings as also in the entry of an order and decree of these proceedings, dated September 22nd, 1917, between Louis H. Perlman, plaintiff-in-error and United States of America, defendant-in-error, manifest error is alleged to the great damage of the plaintiff-in-error we being willing that error, if any there be, should be duly corrected and full and speedy justice done, do command you that you send the record and proceedings herein with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in the said Supreme Court at Washington within thirty days from date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct the errors assigned.

WITNESS THE HONORABLE EDWARD D. WHITE, Chief Justice of the United States, the 27th day of September, 1917.

The foregoing writ is hereby allowed.

Alex. Gilchrist, Jr.,
Clerk.

MANTON,
District Judge.

Assignments of Error.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
FIRESTONE TIRE and RUBBER COMPANY,
Defendant.

IN THE MATTER
of
The Inquiry by the Grand Jurors of the United States into certain violations of Section 125 U. S. C. C., by LOUIS H. PERLMAN,

The above named Louis H. Perlman, having appealed to the Supreme Court of the United States from the judgment and decree of this Court entered on the 22nd day of September, 1917, denying his application to restrain the United States Attorney for the Southern District of New York from using before the grand jury the exhibits referred to in his petition, makes the following Assignments of Error:

First: The Court erred in denying the petition of the said Perlman to restrain the United States At-

torney for the Southern District of New York from using before the grand jury of the United States the exhibits in said petition described.

Second: The Court erred in deciding that to permit the United States Attorney for the Southern District of New York to use said exhibits before the grand jury of the United States would not be a violation of the right assured to the petitioner by the Fourth Amendment to the Constitution of the United States to be secure from unreasonable search and seizure of his papers and effects.

Third: The Court erred in deciding that to permit the United States Attorney for the Southern District of New York to use said exhibits before the grand jury of the United States would not be a violation of the right assured to the petitioner by the Fifth Amendment to the Constitution of the United States, which protected him against being compelled to be a witness against himself in a criminal cause.

Fourth: The Court erred in refusing to decide that to permit the United States Attorney for the Southern District of New York to use said exhibits before the grand jury of the United States would be a violation of the right assured to the petitioner by the Fourth Amendment to the Constitution of the United States to be secure from unreasonable search and seizure of his papers and effects.

Fifth: The Court erred in refusing to decide that to permit the United States Attorney for the Southern District of New York to use the said exhibits before the grand jury of the United States would be a viola-

tion of the right assured to the petitioner by the Fifth Amendment to the Constitution of the United States, which protected him against being compelled to be a witness against himself in a criminal cause.

Sixth: The Court erred in determining that the rights guaranteed to the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States would not be violated by the taking into his possession by the United States Attorney for the Southern District of New York of the exhibits belonging to the petitioner which were impounded under seal in the office of the Clerk of the District Court of the United States for the Southern District of New York under the order granted in the suit wherein Perlman Rim Corporation was the plaintiff and the Firestone Tire and Rubber Company was the defendant, or by the use of said exhibits by said United States Attorney before the grand jury of the United States in an inquiry by it into certain alleged violations of Section 125 of the United States Criminal Code claimed to have been committed by the petitioner.

Dated, New York, September 25, 1917.

SILBERBERG & DAVIS,
Solicitors for Louis H. Perlman,
Office and Post Office Address,
256 Broadway, Manhattan,
New York City.

Citation.

UNITED STATES OF AMERICA, ss:

To Honorable Francis G. Caffey, United States Attorney in and for the Southern District of New York:

GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States in and for the Southern District of New York wherein Louis H. Perlman is plaintiff-in-error and the United States of America is defendant-in-error, and also pursuant to an appeal allowed in a certain proceeding wherein Louis H. Perlman is plaintiff-in-error and United States of America is defendant-in-error, to show cause, if any there be, why the order and decree and judgment rendered against the said plaintiff-in-error, as in the said writ of error and in the petition of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE MARTIN T. MANTON, District Judge of the United States District Court, this 28th day of September, in the year of our Lord one thousand nine hundred and seventeen.

MANTON,
District Judge.

Stipulation of Counsel.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

PERLMAN RIM CORPORATION,
Plaintiff,
against
THE FIRESTONE TIRE & RUBBER COMPANY,
Defendant.

IN THE MATTER
of
The Inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C., by LOUIS H. PERLMAN.

It is stipulated and agreed by and between the United States Attorney in and for the Southern District of New York and the attorneys for Louis H. Perlman, that the record on appeal shall consist of the following:

1. Petition of Louis H. Perlman, verified the 19th day of July, 1917.

2. Order to show cause signed by Hon. Learned Hand, D. J., dated the 23rd day of July, 1917.

3. Affidavit of Harold Harper, Esq., Assistant United States Attorney, verified the 9th day of August, 1917. Order, Hand, J., July 18, 1917, referred to in said affidavit.

4. Decree, dated the 11th day of June, 1917, in the cause wherein Perlman Rim Corporation was plaintiff and The Firestone Tire & Rubber Company was defendant.

5. Order of Hon. Martin T. Manton, D. J., dated the 22nd day of September, 1917.

6. Opinion of Manton, D. J.

7. Petition for Appeal and Allowance.

8. Petition for Writ of Error and Writ of Error.

9. Assignment of Errors.

10. Clerk's Certificate.

Dated, New York, September 25th, 1917.

FRANCIS G. CAFFEY,
United States Attorney.
SILBERBURG & DAVIS,
Attorneys for L. H. Perlman.

United States District Court, Southern District of New York.

LOUIS H. PERLMAN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

It is Hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated N. Y., October 29, 1917.

FRANCIS G. CAFFEY,
Attorney for Def't in Error.
SILVERBERG & DAVIS,
Attorneys for Pl'ff in Error.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

LOUIS H. PERLMAN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of October in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the said United States the one hundred and forty-second.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 26,219. S. New York, D. C. U. S. Term No. 752. Louis H. Perlman, appellant and plaintiff in error, vs. The United States of America. Filed November 1st, 1917. File No. 26,219.

Office Supreme Court, U.
FILED
FEB 23 1918
JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 752.

LOUIS H. PERLMAN,
Appellant and Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief in Opposition to Motion to Dismiss.

LOUIS MARSHALL,
A. A. SILBERBERG,
Counsel for PERLMAN.

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Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 752.

LOUIS H. PERLMAN,
Appellant and Plaintiff
in Error,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief in Opposition to Motion to Dismiss.

The appellant and plaintiff in error, Louis H. Perlman, was the inventor of what is known as a demountable rim for attachment to the wheels of automobiles and other vehicles. Letters Patent of the United States were issued to him for his invention. In October, 1913, he brought an action in the United States District Court for the Southern District of New York against the Standard

Welding Company for infringement of the patent. Issue was joined, a trial followed, and a decree was rendered sustaining the validity of the Letters Patent and finding infringement. This decree was subsequently affirmed by the Circuit Court of Appeals for the Second Circuit. The opinions are reported in *231 Fed. Rep. 453* and *231 Fed. Rep. 734* (*Rec. pp. 1-3*).

During the trial various exhibits were offered in evidence by Perlman. They now are and have continued to be his personal property, and were continuously in his possession and control, or in that of those who represented him, until June 11, 1917 (*Rec. p. 3*).

After the trial of the suit against the Standard Welding Company, Perlman associated himself with others in the organization of the Perlman Rim Corporation. In March, 1916, he assigned to it his Letters Patent, and the corporation is now the owner of them. The assignment did not, however, cover and was not intended to cover the exhibits which were used on the trial of the action brought against the Standard Welding Company (*Rec. p. 3*).

In February, 1917, the Perlman Rim Corporation brought an action against the Firestone Tire & Rubber Company on the charge of infringement of these Letters Patent, issue was joined, and the cause came on for trial before Hon. Learned Hand, a Judge of the United States District Court for the Southern District of New York, on June 4, 1917. The trial lasted for several days, and after a final submission of the evidence adduced the Perlman Rim Corporation, through its counsel, applied to the Court for leave to discontinue the

action and for the dismissal of its bill of complaint, without prejudice. The Court granted the application to discontinue (*Rec. p. 4*), but made an order as follows (*Rec. pp. 22, 23*):

"Ordered, that the bill of complaint herein be and it hereby is dismissed without prejudice with costs to defendant to be taxed; and as a condition of such dismissal and in accordance with plaintiff's stipulation made in open court, it is

Further ordered, that the minutes of the trial be filed and that all the exhibits offered by either party be impounded and deposited with the clerk of this court *under seal to be opened only by order of court on notice to each of the parties hereto;* and

That, all testimony taken up to the present time in this cause (as well as the exhibits) shall stand as testimony which may be read and used in any cause between the parties hereto or between any other parties who would be privies if judgment were entered herein, including cases in which the vendees and users of the rims made or sold by the defendant or such other parties are sued."

The exhibits so offered in evidence and impounded in the custody of the Clerk for the purpose of being kept by him under seal, were the exhibits described in Schedule A (*Rec. pp. 11-14*), and which were used on the trial of the action brought by Perlman against the Standard Welding Company (*Rec. pp. 4, 5*). Each of the exhibits set forth in this schedule was offered as an exhibit on the trial of Perlman Rim Corporation *v.* Firestone Tire & Rubber Company. Every one of them is the personal property of Perlman (*Rec. p. 5*). Perlman was not a party to the action brought against the Firestone Tire & Rubber Company. He was merely a witness on the trial of that

cause, and produced these exhibits from his personal possession or that of those who held them for him (*Rec. p. 4*).

On July 17, 1917, while at the office of the solicitor for the Perlman Rim Corporation, he learned that an order had been served upon the solicitor, signed by Judge Learned Hand, which directed him, as attorney for the Perlman Rim Corporation, and also the attorneys for the Firestone Tire & Rubber Company, to show cause on that day why the United States Attorney for the Southern District of New York should not have and be given the possession, control and custody of the exhibits offered during the trial of the action against the Firestone Tire & Rubber Company, in connection with a proceeding which the United States Attorney had instituted on an investigation which involved the question as to whether Perlman had committeed an offense against the laws of the United States, namely, Section 125 of the United States Criminal Code, in the course of the trial of the action brought by the Perlman Rim Corporation against the Firestone Tire & Rubber Company. *The section referred to defines the crime of perjury.* The solicitor informed Perlman that there had been no opposition to the entry of an order granting unto the United States Attorney the possession and custody of all of the exhibits set forth in Schedule A (*Rec. p. 6*). The order granted is entitled:

"In the Matter of the Inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C. by Louis H. Perlman."

It reads as follows (*Rec. pp. 20, 21*):

"The United States Attorney having moved this Court for an order directing the clerk to produce before the Grand Jury certain exhibits in the suit entitled Perlman Rim Corporation *vs.* Firestone Tire & Rubber Company, and for other relief, the said motion having come on to be heard;

Now, upon reading and filing a certain order to show cause, dated, the 14th day of July, 1917, with due proof of the service thereof upon John Thomas Smith and Charles C. Neave, respectively the attorneys for the plaintiff and defendant in the said suit, and the affidavit of Harold Harper, an Assistant United States Attorney, verified the 13th day of July, 1917, in support of said motion, and the said John Thomas Smith, appearing upon the hearing of said motion and not opposing, and due deliberation having been had, it is, on motion of Francis G. Caffey, United States Attorney,

Ordered, that the clerk of this court produce before the Grand Jury attending this term of court and before any Grand Jury attending a subsequent term thereof upon such day or days as shall be requested of him by the United States Attorney, the exhibits heretofore sealed and impounded in the suit of Perlman Rim Corporation *vs.* Firestone Tire & Rubber Company by a decree granted therein on the 11th day of July, 1917, and that the said clerk permit the said United States Attorney and his assistants to have access to the said exhibits at all reasonable times for the purpose of presenting to the Grand Jury certain matters relating to the above inquiry and of preparing for trial in the event that a true bill shall be found by the Grand Jury, and that the United States Attorney may have such temporary custody of the said exhibits or any part thereof as may be necessary for the purposes aforesaid, under such regulations as the clerk may make respecting their said custody."

The application for this order was based on an affidavit of Mr. Harold Harper, an Assistant United States Attorney, who, after referring to the exhibits in question and showing that they were impounded in accordance with the order of the Court, alleged that he was informed and believed that these exhibits "are material and necessary to the Grand Jury for the investigation in which they are engaged as aforesaid," and asked for an order such as was granted (*Rec. pp. 7, 8*).

A petition setting forth these facts was presented to the United States District Court by Perlman, and an order was granted requiring the United States Attorney to show cause why he should not be restrained and enjoined from using or taking into his possession, custody or control any of the exhibits in question in connection with an inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C., by Louis H. Perlman, or in any other criminal proceeding against him, and in the meantime and until the determination of the application a temporary restraining order was granted (*Rec. pp. 14, 15*).

The United States Attorney appeared on the day fixed for the hearing of the petition, and showed that, during the course of the trial of the suit against the Firestone Tire & Rubber Company, Perlman gave testimony in respect to his alleged invention and that while he was a witness he produced and there were offered in evidence on the part of the Perlman Rim Corporation the exhibits which were the subject of the motion; that Perlman was present during practically all of the proceedings of the trial, including the discussion which resulted in the impounding of the exhibits; that

so far as the minutes of the trial showed no protest was made by him that the exhibits should not be impounded or that they were his property, and that so far as he had been able to ascertain no protest was made by Perlman until the order was made permitting the United States Attorney to inspect these exhibits (*Rec. pp. 17, 18*). In his affidavit Mr. Harper, the Assistant United States Attorney, then alleges (*Rec. p. 18*):

"Certain of the alleged perjuries committed by Perlman refer directly to the exhibits in question, as to the time and manner of their production or alteration; and certain other statements alleged to have been perjured were made by the said Perlman and supported by the exhibits then shown to the Court. The said exhibits are, in deponent's opinion, material and necessary to the investigation by the Grand Jury, whether in fact perjury was committed in such connection and to the proof of such perjury upon trial, if such investigation shall result in a true bill being found by the Grand Jury."

On the hearing before Hon. Martin T. Manton, United States Judge for the Southern District of New York, it was contended on behalf of Perlman, that to permit the United States Attorney to take into his possession or custody and to use these exhibits, would be a violation of the rights of Perlman guaranteed to him by the Fourth and Fifth Amendments to the Constitution of the United States, in that such taking and use would be and constitute an unreasonable search and seizure of his papers and effects, and that by such taking and use he would be compelled in a criminal case to be a witness against himself. On this hearing so much of Perlman's application as related to the

return to him of the exhibits, was withdrawn from the consideration of the Court, and his application was limited to the enjoining of the United States Attorney from using or taking the exhibits or presenting or permitting them to be presented to any United States Grand Jury (*Rec. p. 25*).

The application was denied (*Rec. p. 26*). Thereupon Perlman prayed for and was allowed an appeal and a writ of error to this Court, to enable him to review the denial of his application. In the meantime a supersedeas has been granted (*Rec. pp. 32-38*).

Assignments of Error.

The appellant and plaintiff in error has assigned the following grounds of error (*Rec. pp. 39-41*):

"*First*: The Court erred in denying the petition of the said Perlman to restrain the United States Attorney for the Southern District of New York, from using before the Grand Jury of the United States the exhibits in said petition described."

"*Second*: The Court erred in deciding that to permit the United States Attorney to use the exhibits would not be a violation of the right assured to the petitioner by the Fourth Amendment to the Constitution of the United States to be secure from unreasonable search and seizure of his papers and effects."

"*Third*: The Court erred in deciding that to permit the United States Attorney to use the exhibits before the Grand Jury of the United States would not be a violation of the right assured to the petitioner by the Fifth Amendment to the Constitution of the United States, which protected him against being compelled to be a witness against himself in a criminal cause."

The Fourth and Fifth Assignments of Error are practically the same as the Second and Third.

"*Sixth*: The Court erred in determining that the rights guaranteed to the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States would not be violated by the taking into his possession by the United States Attorney for the Southern District of New York of the exhibits belonging to the petitioner which were impounded under seal in the office of the Clerk of the District Court of the United States for the Southern District of New York under the order granted in the suit wherein Perlman Rim Corporation was the plaintiff and the Firestone Tire & Rubber Company was the defendant, or by the use of said exhibits by said United States Attorney before the Grand Jury of the United States in an inquiry by it into certain alleged violations of Section 125 of the United States Criminal Code claimed to have been committed by the petitioner."

POINTS.

I.

If it is doubtful as to whether a case should be brought up on appeal or by writ of error it may be brought up by both modes, and this Court, when it comes to examine the case, will determine whether it is properly brought up by appeal or writ of error, and proceed accordingly.

Hurst v. *Hollingsworth, 94 U. S. 111; 100 U. S. 100.*

Plymouth Mining Co. v. *Amador Canal Co., 118 U. S. 264.*

Kenaday v. *Sinnott, 179 U. S. 606.*

Lockman v. *Lang, 132 Fed. Rep. 1.*

II.

Irrespective of the title to the proceeding brought to this Court, it is an application by Perlman to restrain the United States Attorney from seizing and using his papers and effects as evidence against him in a proceeding before a Grand Jury of the United States, and the proceeding has been so regarded by the United States Attorney.

The suit of *Perlman Rim Corporation* v. *Firestone Tire & Rubber Company* was dismissed on June 11, 1917 (*Rec. p. 22*). By the decree of dismissal the exhibits belonging to Perlman were impounded and deposited with the Clerk of the Court, under seal. So long as they were thus impounded and could only be used for the purpose set forth in the decree we will assume that Perlman could not have interfered (*Ex parte Uppercu, 239 U. S. 435*). But when the United States Attorney undertook to acquire possession of these papers and effects, which were sealed and impounded for the special purpose indicated in the decree of the Court, and sought to use them as evidence against Perlman, their owner, before the Grand Jury of the United States, on a criminal charge against Perlman, the latter, in order to prevent such unlawful and unconstitutional use, had no alternative but to apply by petition to the Court in whose possession these papers and effects were for the purpose of restraining the United States Attorney from taking possession of the papers and effects

and of making unlawful use of them. Perlman had not been served with notice of the application made by the United States Attorney. He was not a party to the action. The application made by Perlman was, in effect, to annul, so far as he was concerned and for the protection of his personal rights, the order granted to the United States Attorney and to prevent him from removing from these exhibits the seal of the Court and taking them out of its possession and using them as the basis of a criminal proceeding against him.

Surely, in order to enable Perlman to make the application for the protection of his interests, it was not necessary that he should be a party to the suit of *Perlman Rim Corporation* v. *Firestone Tire & Rubber Company*. In fact it was just because he was not a party to that suit that he insisted upon his constitutional right of protection against the violation of the guaranties of the Fourth and Fifth Amendments.

Nor is it necessary to regard his application as an attempted intervention in that suit. It was a proceeding entirely independent of the suit. That was only referred to because the order impounding his papers and effects was made in the suit. For all practical purposes the title was of no possible importance. He presented a petition which might as well have remained without a title. On the strength of this petition an order to show cause was issued by the Court to the United States Attorney. The latter appeared and litigated the application upon its merits. No objection was made on the ground of jurisdiction, or because neither Perlman nor the United States Attorney was a party to the equity suit; nor did the Court render judgment on any such ground. The

denial of Perlman's application was on the merits. The matter litigated was, as to whether or not the proposed use of Perlman's papers and effects was in violation of his constitutional rights. Certainly Perlman had a personal interest in the subject matter of the litigation which he thus initiated for the safeguarding of his rights. He adopted the most direct, simple and expeditious method of procuring an adjudication with respect to them.

The cases cited by the Solicitor General have no application here.

In *Smith* v. *Indiana, 191 U. S. 138,* a public officer of Indiana, who had no personal interest in a litigation which related to the constitutionality of a State statute, sought to sue out a writ of error to this Court, purely in the interest of third parties, after judgment had been rendered against him by the highest court of the State. It was held that, having no personal interest, he could not invoke the jurisdiction of this Court.

McCandless v. *Pratt, 211 U. S. 437,* was a similar case. There it was held that a writ of error would not lie to review a judgment of the Supreme Court of Hawaii dismissing the bill in a suit brought by a taxpayer to enjoin the land commissioner from an alleged unauthorized use of public lands, it not appearing that the complainant would be personally injured by the threatened use. There, again, the party seeking to confer jurisdiction on this Court had no personal interest in the matter litigated. Here, however, the interest of Perlman in the matter sought to be litigated is vital and obvious.

In *Ex Parte Leaf Tobacco Board of Trade, 222 U. S. 578,* the petitioners, who sought the vacation of the decree in the case of *United States* v.

American Tobacco Company by writs of mandamus, prohibition and certiorari, were not parties to the record and judgment which they were seeking to annul and overthrow. The Circuit Court of the United States had refused to permit them to become parties to the record, and the refusal of the Court was held not reviewable, especially since the petitioners' interest was not as here direct, but merely of a general nature and the act of the Court which was assailed had been accepted by the parties to the record. Here the parties to the record had no interest in the matter as to which Perlman sought an adjudication.

Nor has *Louisiana* v. *Jack, 244 U. S. 397,* any application here. It was there held that, generally speaking, the authority of a court to make new parties to a suit, especially after decree, rests in its sound discretion, and that a judgment may not be reviewed by one who is not a party or privy to the record.

So far as the present case is concerned, Perlman is a party to the record, and was so recognized by the United States Attorney and by the Court below. To say that he cannot review the order of the Court which was adverse to him, merely because it has been entitled in a suit which has been dismissed, is to pursue a shadow and to lose sight of the substance.

It is well settled that any person may appeal or bring error if he was a party to an action or proceeding below, either originally or because subsequently made a party, or if he is a party or privy to the judgment, order or decree complained of. Perlman and the United States Attorney were both parties to the order of which the former complains, by which the relief sought

by him is denied. The order so shows upon its face.

Ex parte Southern Alabama R. R. Co., 95 U. S. 221.
The M. Burns v. *Reynolds, 9 Wall. 237.*
Savannah v. *Jesup, 106 U. S. 563.*
Hobart v. *Hobart, 86 N. Y. 636, 637.*
Tuttle v. *Claflin, 88 Fed. Rep. 122.*

Even though one is not a party to a suit or proceeding, if he is treated as such his right to appeal exists.

Ex parte Cutting, 94 U. S. 14.
Ex parte Cockcroft, 104 U. S. 578.

In the first of these cases Chief Justice Waite said:

"We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus in *Myers* v. *Fenn, 5 Wall. 205,* 'the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;' and in *Harrison* v. *Nixon, 9 Pet. 491,* 'inquiries were made as to the respective claims, as asked for, and 'as to all parties who were claimants before the court by bill, petition, or otherwise, their complaint, petition, and proceedings were dismissed.' So, in *Ogilvie* v. *Knox Ins. Co., 2 Black, 539,* petitions were filed by certain creditors praying to be made parties, and that a receiver might be appointed, which was done; and in *Bronson* v. *LaCrosse R. R. Co., 2*

Wall. 304, certain stockholders in a corporation were permitted to appear in a cause to which the corporation was a party, and present their several claims by answer in the name of the corporation; but this afterwards having been found to be irregular, the answers were considered 'rather by indulgence than a matter of strict right as the answer of the individual stockholders.' Upon the same principle, it was held in *Railroad Co.* v. *Bradleys, 7 Wall. 755,* that where an appeal had been prayed for, and subsequently an appeal bond, approved by one of the judges had been filed in the court, it would be inferred that an appeal had been allowed, although there was no express order to that effect in the record.

"From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition tht court to that effect, but his petition must be granted; *and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party.*"

Among other cases similar to the present in which appeals have been permitted may be instanced the following:

In *Marion National Bank* v. *Abell, 88 Ky. 428,* an appeal was allowed from an order which required the appellant to produce his private books for inspection.

In *Matter of Ehrich* v. *Root, 134 App. Div. 432,* an appeal was allowed from an order for the examination of a safe deposit box held by a judgment debtor and a third person.

A purchaser at a foreclosure sale has been held to acquire such an interest in the property sold that he may appeal from an order setting aside or

refusing to confirm or confirming a sale over his objection.

Kneeland v. *American Loan Co., 136 U. S. 89.*
Butterfield v. *Usher, 91 U. S. 246.*

A person is aggrieved when a judgment decree or order operates prejudicially and directly upon his personal rights, even though he be not a party to the action, or even though the order complained of was made after judgment has been rendered in the action.

Thus in *The Farmers' Loan and Trust Company, Petitioner, 129 U. S. 206,* after a decree of foreclosure of a mortgage upon the property of a railroad company, an order was made that the receiver of the mortgaged property might borrow money and issue certificates therefor, which were to be a first lien upon it. It was held that an appeal could lie from such order to this Court

In *Williams* v. *Morgan, 111 U. S. 684,* it was held that the holder of railroad bonds secured by a mortgage under foreclosure, had such an interest in the amount of the trustee's compensation as entitled him to appeal from a decree of the Circuit Court in a suit for the foreclosure of a railroad mortgage which fixed the compensation to be paid to the trustee under the mortgage from the fund realized from the sale.

In *Central Trust Co.* v. *Grant Locomotive Works, 135 U. S. 207,* it was held that a decree in a suit for the foreclosure of a railroad mortgage that the claim by a creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just and entitled to priority over the debts secured by the mort-

gage, could be brought to this Court by appeal, the matter being distinct from the general subject of the litigation.

In *Gumbel* v. *Pitkin, 113 U. S. 545,* it was held that when a third party intervenes in a pending suit to claim property in the custody of a marshal by virtue of a writ of attachment rendered therein, a judgment dismissing his intervention is final as to that issue, as is also one distributing the proceeds of the property to other parties, and is reviewable.

In *Bessette* v. *W. B. Conkey Co., 194 U. S. 324,* it was held that if a person adjudged in contempt and fined therefor is not a party to the suit in which the order is made, he can review the order by writ of error.

III.

The contention that this is an attempt to determine the guilt or innocence of Perlman by piecemeal, is without foundation.

The purpose of this proceeding is to protect Perlman against an unconstitutional invasion of his rights of property and his personal liberty. The fact that such invasion, if successful, may result in his indictment, does not convert this into an attempt to review a step in a criminal proceeding.

According to the contention of the Solicitor General, one whose papers and effects are sought to be wrongfully seized for the purpose of using them

in a contemplated criminal proceeding, cannot appeal to this Court for the protection of his rights until after he had been indicted as a result of the violation of the rights guaranteed to him by the Constitution and has been tried and convicted by means of testimony thus unlawfully secured. In other words he must sit silently by, without using any preventive measures to secure himself against the threatened seizure of his property and the invasion of his liberty by unlawful means.

The cases relied upon do not sustain the proposition in support of which they are cited.

In *McLish* v. *Roff, 141 U. S. 661,* the decision sought to be reviewed was not a final order or judgment. The authorities cited under Point II show that the decision which is here sought to be reviewed is final in its essential nature. Perlman's petition was denied on its merits. It was adjudged that he could not restrain the United States Attorney from seizing his papers and effects and using them as evidence against him. The order made finally terminated the proceeding which he instituted. There was no direction to plead over. There was nothing more that could be done in the proceeding.

In *Covington* v. *Covington First National Bank, 185 U. S. 270,* matters within the pleadings in the cause were left undetermined by the Court of Claims and the cause was retained for the purpose of thereafter passing upon them and for the entry of a further decree thereon. Hence the decree entered in the lower court was not final and not reviewable in this Court.

In the present case, however, there was nothing left to be determined with respect to the matter presented by the petition. That was decided as a

finality. There has as yet been no indictment. It is threatened, but the papers and effects belonging to Perlman which he is seeking to keep out of the hands of the United States Attorney, and which the latter insists upon using for the purpose of procuring an indictment have not yet become available for that purpose by the supersedeas granted on the appeal and writ of error allowed herein. Hence this is not a case where fragments of a litigation are brought here by successive appeals. The entire controversy so far as it has existed and as it still exists, was judicially ended so far as the District Court is concerned when that court made its order denying Perlman's petition.

Nor is this case like *Heike* v. *United States, 217 U. S. 423.* There the plaintiff in error was indicted for a violation of the Customs Law of the United States. He appeared and filed a special plea in bar claiming immunity from prosecution under an Act of Congress. The plea was decided in favor of the Government and Heike was granted the privilege of pleading over. He thereupon entered a plea of not guilty, and the case was set for trial. He then sought to review the judgment rendered against him on his plea. Clearly that was not a final judgment. The criminal case was still pending, the main issues were still to be tried, the judgment on the plea was merely interlocutory. Here there is no issue to be tried. The only issue thus far existing between Perlman and the Government has been decided.

Philadelphia & Reading R. R. Co. v. *United States, 244 U. S. 644,* in so far as the facts can be learned, is understood to be similar in character to the other cases cited. The decision sought to be reviewed lacked the element of finality.

IV.

The proposed use by the United States Attorney before the Grand Jury of Perlman's exhibits as the basis for an indictment against him, constitutes an unreasonable seizure and the making of him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments.

The Fourth Amendment guarantees security *to all people* in their papers and effects against unreasonable seizure and the Fifth Amendment protects every person from being compelled, in any criminal case, to be a witness against himself. These guaranties against unreasonable seizures and of being compelled to be a witness in a criminal case have so often been considered together in the decisions, that pursuing the course of authority we shall treat both guaranties together. They have been carefully considered and enforced in

Boyd v. *United States, 116 U. S. 616.*
Weeks v. *United States, 232 U. S. 383.*
Hale v. *Henkel, 201 U. S. 43.*
United States v. *Wong Quong Wong, 94 Fed. 832.*

New Jersey v. *McHill, 192 Fed. 586.*
United States v. *Mills, 185 Fed. 318.*
United States v. *Abrams, 230 Fed. Rep. 313.*
Counselman v. *Hitchcock, 142 U. S. 547.*

In *Weeks* v. *United States* (*supra*), the most recent of these decisions, police officers of the State of Missouri entered the defendant's home while he was absent and took therefrom certain lottery tickets and letters. Before the trial of the indictment returned against the defendant, he made application for a direction that all papers taken from his home be returned to him. The court directed the return of some of the papers and refused to direct the return of others of the papers seized. The latter were used against him on the trial of the indictment. This Court held that the refusal to return the papers was error. Mr. Justice Day, said:

"The effect of the Fourth Amendment is to put the Courts of the United States and Federal officials in the exercise of their power and authority under limitations and restraints as to the exercise of such power and authority and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures, under the guise of the law * * * The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices and destructive of rights secured by the Federal Constitution, shall find no sanction by the Judge of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. * * *

"Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained. . . . The case, in the aspect in which we are dealing with it, involves the right of the court in a criminal prosecution to return for the purposes of evidence the letters and correspondence of the accused seized in his house in his absence and without his authority. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters as well as other property.

"*If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.*

"The efforts of the court and their officials to bring the guilty of punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

"We, therefore, reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused.

"The Government also relies upon Hale *v.* Henkel, 201 U. S. 43 in which the previous cases of Boyd *v.* The United States (supra); Adams *v.* United States (supra); Interstate Commerce Commission *v.* Baird, 194 U. S. 25 and Interstate

Commerce Commission *v.* Brimson, 154 U. S. 447 are reviewed, and where in it was held that a subpoena duces tecum requiring the corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies located in different parts of the United States, was an unreasonable search and seizure within the Fourth Amendment, and it was there stated that (201 U. S. 76) *an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law and a seizure contemplates a forcible disposition of the owner, still, as we held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection.''*

In *United States* v. *Mills,* 185 Fed. Rep. 318, Judge Lacombe was called on to determine the propriety of a petition which asked that the United States Marshal and District Attorney return certain books and papers to the defendant. The defendant had been indicted for conspiracy to defraud the United States in connection with the importation of merchandise and a warrant was issued and pursuant to it the Marshal seized the defendant's books and papers which covered his entire business including records which related to the charge against the defendant. The court held that the seizure was improper. The District Attorney and the Marshal were directed to surrender the books and papers seized, in spite of the insistence of the District Attorney that the books and papers showed the commission by the

defendant of offenses against the United States. The learned Court said:

"It may be highly desirable from the point of view of a prosecuting officer that some such comprehensive seizure of the person's books and papers should be had; the trial of an offense charged may be thus facilitated and it may be easier to discover that the same person has been guilty of other similar offenses. It may promote the hands of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authority to organized society. Opinions will differ as to which is the wiser public policy. But whatever may be one's individual opinion, it is difficult to say how a subordinate Federal Court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court, in Boyd *v.* United States (116 U. S. 616) remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in which it has been referred to, do not indicate that the practice followed in this case should be approved."

In *Boyd* v. *United States, 116 U. S. 618,* the Court had under consideration the validity of an Act of Congress which authorized a court of the United States on motion of the Government attorney to require a person charged with a penalty or forfeiture under the Revenue Laws to produce in court his books, papers and records. The defendant produced his records and claimed that he was thereby compelled to furnish evidence against himself in a criminal proceeding and that the production was also an unwarranted seizure in violation of the Fourth and Fifth Amendments to

the Constitution. His contention was sustained. In the course of the opinion this Court cited with approval Lord Camden's decision in *Entick* v. *Carrington*, 19 Howell's State Trials 1029, and added:

"The principles laid down in this opinion (Lord Camden's in Entick *v.* Carrington) affect the very essence of constitutional liberty and security. They reach further than the concrete form of a case thus before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employes of the sanctity of a man's home and the privacies of life. *It is not the breaking of his drawers*, that constitutes the essence of the offense, but it is the invasion of the indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense—it is the invasion of the sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation for, any forcible and compulsory extortion of a man's testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment, and compelling a man in a criminal case to be a witness against himself which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the

Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.

"It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers are wanting, and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts, but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. *It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, as in all cases in which a search would be;* because it is a material ingredient and affects the sole object and purpose of a search and seizure * * *"

Perlman occupies a better position than did Boyd for he came into court originally as a witness in a cause to which he was not a party. The plaintiff, on whose behalf Perlman gave testimony, offered Perlman's exhibits in evidence. The suit was discontinued and Perlman's property was impounded but for a special purpose only. His papers and effects, though so impounded were to be kept under seal. They were taken into custody solely for the advantage of parties to the suit in which the decree was made and their privies. They were not seized for any other purpose. As soon as Perlman learned that it was proposed to seize them for use in a criminal proceeding sought to be instituted against him by the United States Attorney he protested and filed his petition for the protection of his rights and invoked the Con-

stitution to shield himself from the invasion of his rights without his consent. His property thus unlawfully sought to be taken into the possession of the United States Attorney is now about to be used in an attempt to fasten upon him the charge that he committed some offense or offenses against the laws of the United States.

In *United States* v. *Wong Quong Wong* (*supra*), the defendant had been ordered to be deported. He delivered his personal letters to one of the Government officers and these were sought to be used with the object of establishing the commission of crime by the defendant. The use of the letters for that purpose was held unwarranted. The court decided that the use by the Government officials of the letters after the defendant interposed objection to their use constituted "a seizure and compulsory production of a man's private papers and was equivalent to compelling the defendant to be a witness against himself, and was prohibited by the Fourth and Fifth Amendments to the Constitution."

In *United States* v. *Abrams* (*supra*), the defendants imported merchandise from a foreign country. Two government officers came to the defendants' place of business and asked for the delivery to them of certain of the defendants' papers and records. The defendants surrendered the papers to the Government officials and the papers were later made the subject of an inquiry set on foot to prove that the defendants had committed an offense against the laws of the United States. They then made application for a return of the papers and in support of his decision granting it Judge Howe wrote:

"Do the same reasons and rule apply to obtaining from a defendant papers which contain evidence of a crime as would apply in obtaining an oral admission of crime from him? The same reasons and rule should and do apply and the fact that the evidence thus obtained is written makes no difference. The defendant's constitutional rights are as much violated in one case as in the other. The taking of the papers from this defendant without his consent was also a seizure of them that was unreasonable and contrary to the spirit of the Fourth Amendment. U. S. *v.* Wong Quong Wong, 94 Fed. 832; Weeks *v.* U. S., 232 U. S. 383.

"The right of this court to order a return of papers in the possession of the District Attorney and other officers of the court, which have been obtained by officers of the government, while acting under color of their office, is fully recognized and established in Weeks *v.* U. S. (*supra*), and the opinion therein by Mr. Justice Day is exhaustive on this subject and nothing appears to be necessary here, but to refer to it and follow it.

"Therefore, the conclusion is that the papers in question were taken from the defendants by officials of the United States, acting under color of their office in violation of the defendant's constitutional rights, and having made a seasonable application for their return, an order will be made that the District Attorney return them to the defendants forthwith."

In *Counselman* v. *Hitchcock* (*supra*), this Court said:

"It is an ancient principle of the law of evidence that a witness shall not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures. The relation of Councilman to the subject of inquiry before the Grand Jury as shown by the questions

put to him in connection with the provisions of the Interstate Commerce Act, entitled him to invoke the protection of the Constitution.

"The meaning of the constitutional provision (Fifth Amendment—"no person shall be compelled in any criminal proceeding to be a witness against himself") is not merely that a person shall not be compelled to be a witness against himself; but its object is to insure that a person shall not be compelled when acting as a witness in any investigation to give testimony which may tend to show that he himself has committed a crime."

Here, Perlman as the *owner* of the exhibits, which the United States Attorney proposes to use before the Grand Jury in an inquiry for the determination as to whether he has committed an offense against the laws of the United States, asks for his constitutional protection. The exhibits were taken and are withheld from him by force and are sought to be used for a purpose other than that for which they were taken in the first instance, and in violation of the terms of the order impounding them. Their use before the Grand Jury in an investigation wherein he is a defendant, or an investigation which is directed against him is a use against which he is protesting vigorously, and will constitute a compulsory production of his papers and effects before the Grand Jury. Perlman will thus be forced to furnish evidence in a criminal proceeding against himself. Such use will also be an unlawful and unwarranted seizure and retention of his papers and records because in violation of the Fourth and Fifth Amendments.

Ballman v. *Fagin, 200 U. S. 186.*
Ex Parte Chapman, 153 Fed. 371.
In re Kanter, 117 Fed. 356.

In re Hess, 134 Fed. 109.
Wilson v. *U. S. 221, U. S. 361.*
Foot v. *Buchanan, 113 Fed. 156.*
People v. *Forbes, 143 N. Y. 219.*
Lamsen v. *Boyden, 160 Ill. 613.*
Emery's Case, 107 Mass. 172.

There has been no waiver by Perlman of his right to prevent the use of the exhibits in a criminal investigation, by his appearance as a witness in the suit brought by the Perlman Rim Corporation against the Firestone Tire & Rubber Company or by his production of the exhibits and giving testimony concerning them.

The claim of waiver overlooks the relation of the parties before the court. Perlman was not a party to the cause. He did appear as a witness and the exhibits were produced by him but were so produced only in connection with the issues involved in the cause on trial,—*a very limited purpose.* He at no time surrendered the exhibits. Their mere production in court for the purpose of the trial then in progress was not a surrender of the title nor of the possession of them. The decisions in

Boyd v. *United States* (*supra*).
Weeks v. *United States* (*supra*).
United States v. *Mills* (*supra*).
United States v. *Wong Quong Wong* (*supra*).
United States v. *Abrams* (*supra*).

all lead to the irresistible conclusion that Perlman has the absolute right to insist as he does, that the exhibits, his property, shall not be used against him in any criminal proceeding. The ex-

hibits, the use of which it is sought to prevent, have not as yet reached the possession of the United States Attorney and in this respect the facts are much stronger in favor of Perlman than were the facts in the cases cited.

In all of these cases there had been actual delivery and surrender to the Government officials, yet the circumstances of the surrender or delivery were inquired into and where the delivery or surrender was found to have been made *without the intent of permitting the books and papers to be used against their owners in a criminal proceeding* their use was forbidden, and the claim of waiver was overruled.

Thus in *United States* v. *Abrams* the Court found that the papers had been delivered upon the statement of the Government officials that the defendant would be better served by the delivery. The defendant abided by the advice so given but the Court said:

"None of these papers were voluntarily delivered to the officers. They were all obtained by the promise or threat that it would be better for the defendant if he gave Mr. Chandler what he wanted. This promise or threat influenced this defendant to part with his papers, and made their delivery involuntary in the eyes of the law. (Bram *v.* U. S. 168 U. S. 532) at page 542. The delivery of these papers may well be likened to a confession which is incompetent because not voluntarily made * * *"

So also in *United States* v. *Wong Quong Wong,* the Court determined that the mere naked retention of letters after objection by the defendant constituted *a seizure and compulsory production*

in spite of the fact that the letters were voluntarily given to the Customs official. The letters were made the subject of inquiry as to the commission of crime by the defendant. He objected to their use for that purpose and the court held that there was no waiver and that their retention constituted a seizure and compulsory production of the defendant's papers. Said the Court:

"A seizure or compulsory production of a man's private papers to be used in evidence against him; is equivalent to compelling him to be a witness against himself, prohibited by the Fifth Amendment to the Constitution and is equally within the prohibition of the amendment in the prosecution of crime, or in a proceeding for a penalty of forfeiture."

That it was within the power of the District Court, as well as its duty to grant the relief for which Perlman prayed was squarely decided in *Weeks* v. *United States* (*supra*), where in addition to the language already quoted from the opinion of Mr. Justice Day, he said:

"The right of the court to deal with papers and documents in the possession of the District Attorney and other officers of the court and subject to its authority was recognized in Wise *v.* Henkel (221 U. S. 556). That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. Bishop on Criminal Procedure, Sec. 210, Rex. *v.* Barnett, 3 C & O 600; 185 Fed. Rep. 318; United States *v.* McHie, 194 Fed. Rep. 894, 898."

See also

Griffin v. *Thompson, 2 How. 244.*
In re Birdsong, 39 Fed. 599.
U. S. v. *Burr, 25 Fed. Cas. 41, at p. 48.*
Ex Parte Davos, 112 Fed. Cas. 1193.
Sec. 725, U. S. Rev. Stat.

V

The motion to dismiss the appeal and writ of error should be denied.

Louis Marshall,
A. A. Silberberg,
Counsel for Perlman.

28

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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 752.

LOUIS H. PERLMAN,
Appellant and Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Appellant and Plaintiff-in-Error.

LOUIS MARSHALL,
A. A. SILBERBERG,
Counsel for PERLMAN.

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Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 752.

LOUIS H. PERLMAN,
Appellant and Plaintiff
in Error,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Appellant and Plaintiff in Error.

The appellant and plaintiff in error, Louis H. Perlman, was the inventor of what is known as a demountable rim for attachment to the wheels of automobiles and other vehicles. Letters Patent of the United States were issued to him for his invention. In October, 1913, he brought an action in the United States District Court for the Southern District of New York against the Standard Welding Company for infringement of the pat-

ent. Issue was joined, a trial followed, and a decree was rendered sustaining the validity of the Letters Patent and finding infringement. This decree was subsequently affirmed by the Circuit Court of Appeals for the Second Circuit. The opinions are reported in *231 Fed. Rep. 453 and 231 Fed. Rep. 734* (*Rec. pp. 1-3*).

During the trial various exhibits were offered in evidence by Perlman. They now are and have continued to be his personal property, and were continuously in his possession and control, or in that of those who represented him, until June 11, 1917 (*Rec. p. 3*).

After the trial of the suit against the Standard Welding Company, Perlman associated himself with others in the organization of the Perlman Rim Corporation. In March, 1916, he assigned to it his Letters Patent, and the corporation is now the owner of them. The assignment did not, however, cover and was not intended to cover the exhibits which were used on the trial of the action brought against the Standard Welding Company (*Rec. p. 3*).

In February, 1917, the Perlman Rim Corporation brought an action against the Firestone Tire & Rubber Company on the charge of infringement of these Letters Patent. Issue was joined, and the cause came on for trial before Hon. Learned Hand, a Judge of the United States District Court for the Southern District of New York, on June 4, 1917. The trial lasted several days, and after a final submission of the evidence adduced, the Perlman Rim Corporation, through its counsel, applied to the Court for leave to discontinue the action and for the dismissal of its bill of complaint, without prejudice. The

Court granted the application to discontinue (*Rec. p. 4*), but made a decree as follows (*Rec. pp. 22, 23*):

"Ordered, that the bill of complaint herein be and it hereby is dismissed without prejudice with costs to defendant to be taxed; and as a condition of such dismissal and in accordance with plaintiff's stipulation made in open court, it is

Further ordered, that the minutes of the trial be filed and that all the exhibits offered by either party be impounded and deposited with the clerk of this court *under seal to be opened only by order of court on notice to each of the parties hereto;* and

That, all testimony taken up to the present time in this cause (as well as the exhibits) shall stand as testimony which may be read and used in any cause between the parties hereto or between any other parties who would be privies if judgment were entered herein, including cases in which the vendees and users of the rims made or sold by the defendant or such other parties are sued."

The exhibits so offered in evidence and impounded in the custody of the Clerk for the purpose of being kept by him under seal, were the exhibits described in Schedule A (*Rec. pp. 11-14*). Each of the exhibits set forth in this schedule was offered as an exhibit on the trial of Perlman Rim Corporation *v.* Firestone Tire & Rubber Company. Every one of them is the personal property of Perlman (*Rec. p. 5*). Perlman was not a party to the action brought against the Firestone Tire & Rubber Company. He was merely a witness on the trial of that cause, and produced these exhibits from his personal possession or that of those who held them for him (*Rec. p. 4*).

On July 17, 1917, while at the office of the solicitor for the Perlman Rim Corporation, he learned

that an order had been served upon the solicitor, signed by Judge Learned Hand, which directed him, as attorney for the Perlman Rim Corporation, and also the attorneys for the Firestone Tire & Rubber Company, to show cause on that day why the United States Attorney for the Southern District of New York should not have and be given the possession, control and custody of the exhibits offered during the trial of the action against the Firestone Tire & Rubber Company, in connection with a proceeding which the United States Attorney had instituted on an investigation which involved the question as to whether Perlman had committed an offense against the laws of the United States, namely, Section 125 of the United States Criminal Code, in the course of the trial of the action brought by the Perlman Rim Corporation against the Firestone Tire & Rubber Company. *The section referred to defines the crime of perjury.* The solicitor informed Perlman that there had been no opposition to the entry of an order granting unto the United States Attorney the possession and custody of all of the exhibits set forth in Schedule A (*Rec. p. 6*). The order so granted is entitled:

"In the Matter of the Inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C. by Louis H. Perlman."

It reads as follows (*Rec. pp. 20, 21*):

"The United States Attorney having moved this Court for an order directing the Clerk to produce before the Grand Jury certain exhibits in the suit entitled Perlman Rim Corporation *vs.* Firestone

Tire & Rubber Company, and for other relief, the said motion having come on to be heard;

Now, upon reading and filing a certain order to show cause, dated, the 14th day of July, 1917, with due proof of the service thereof upon John Thomas Smith and Charles C. Neave, respectively the attorneys for the plaintiff and defendant in the said suit, and the affidavit of Harold Harper, an Assistant United States Attorney, verified the 13th day of July, 1917, in support of said motion, and the said John Thomas Smith, appearing upon the hearing of said motion and not opposing, and due deliberation having been had, it is, on motion of Francis G. Caffey, United States Attorney,

Ordered, that the Clerk of this Court produce before the Grand Jury attending this term of court and before any Grand Jury attending a subsequent term thereof upon such day or days as shall be requested of him by the United States Attorney, the exhibits heretofore sealed and impounded in the suit of Perlman Rim Corporation *vs.* Firestone Tire & Rubber Company by a decree granted therein on the 11th day of July, 1917, and that the said Clerk permit the said United States Attorney and his assistants to have access to the said exhibits at all reasonable times for the purpose of presenting to the Grand Jury certain matters relating to the above inquiry and of preparing for trial in the event that a true bill shall be found by the Grand Jury, and that the United States Attorney may have such temporary custody of the said exhibits or any part thereof as may be necessary for the purposes aforesaid, under such regulations as the Clerk may make respecting their said custody."

The application for this order was based on an affidavit of Mr. Harold Harper, an Assistant United States Attorney, who, after referring to the exhibits in question and showing that they were impounded in accordance with the order of

the Court, alleged that he was informed and believed that these exhibits "are material and necessary to the Grand Jury for the investigation in which they are engaged as aforesaid," and asked for an order such as was granted (*Rec. pp. 7, 8*).

A petition setting forth these facts was presented to the United States District Court by Perlman, and an order was granted requiring the United States Attorney to show cause why he should not be restrained and enjoined from using or taking into his possession, custody or control any of the exhibits in question in connection with an inquiry by the Grand Jurors of the United States into certain alleged violations of Section 125 U. S. C. C., by Louis H. Perlman, or in any other criminal proceeding against him, and in the meantime and until the determination of the application a temporary restraining order was granted (*Rec. pp. 14, 15*).

The United States Attorney appeared on the day fixed for the hearing of the petition, and showed that, during the course of the trial of the suit against the Firestone Tire & Rubber Company, Perlman gave testimony in respect to his alleged invention and that while he was a witness he produced and there were offered in evidence on the part of the Perlman Rim Corporation the exhibits which were the subject of the motion; that Perlman was present during practically all of the proceedings of the trial, including the discussion which resulted in the impounding of the exhibits; that so far as the minutes of the trial showed no protest was made by him that the exhibits should not be impounded or that they were his property, and that so far as he had been able to ascertain no

protest was made by Perlman until the order was made permitting the United States Attorney to inspect these exhibits (*Rec. pp. 17, 18*). In his affidavit Mr. Harper, the Assistant United States Attorney, then alleges (*Rec. p. 18*):

"Certain of the alleged perjuries committed by Perlman refer directly to the exhibits in question, as to the time and manner of their production or alteration; and certain other statements alleged to have been perjured were made by the said Perlman and supported by the exhibits then shown to the Court. The said exhibits are, in deponent's opinion, material and necessary to the investigation by the Grand Jury, whether in fact perjury was committed in such connection and to the proof of such perjury upon trial, if such investigation shall result in a true bill being found by the Grand Jury."

On the hearing before Hon. Martin T. Manton, United States Judge for the Southern District of New York, it was contended on behalf of Perlman, that to permit the United States Attorney to take into his possession or custody and to use these exhibits, would be a violation of the rights of Perlman guaranteed to him by the Fourth and Fifth Amendments to the Constitution of the United States, in that such taking and use would be and constitute an unreasonable search and seizure of his papers and effects, and that by such taking and use he would be compelled in a criminal case to be a witness against himself. On this hearing so much of Perlman's application as related to the return to him of the exhibits, was withdrawn from the consideration of the Court, and his application was limited to the enjoining of the United States Attorney from using or taking the exhibits

or presenting or permitting them to be presented to any United States Grand Jury (*Rec. p. 25*).

The application was denied (*Rec. p. 26*). Thereupon Perlman prayed for and was allowed an appeal and a writ of error to this Court, to enable him to review the denial of his application. In the meantime a supersedeas has been granted (*Rec. pp. 32-38*)

Assignments of Error.

The appellant and plaintiff in error has assigned the following grounds of error (*Rec. pp. 39-41*):

"*First*: The Court erred in denying the petition of the said Perlman to restrain the United States Attorney for the Southern District of New York, from using before the Grand Jury of the United States the exhibits in said petition described."

"*Second*: The Court erred in deciding that to permit the United States Attorney to use the exhibits would not be a violation of the right assured to the petitioner by the Fourth Amendment to the Constitution of the United States to be secure from unreasonable search and seizure of his papers and effects."

"*Third*: The Court erred in deciding that to permit the United States Attorney to use the exhibits before the Grand Jury of the United States would not be a violation of the right assured to the petitioner by the Fifth Amendment to the Constitution of the United States, which protected him against being compelled to be a witness against himself in a criminal cause."

The Fourth and Fifth Assignments of Error are practically the same as the Second and Third.

"*Sixth*: The Court erred in determining that the rights guaranteed to the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States would not be violated by the taking into his possession by the United States Attorney for the Southern District of New York of the exhibits belonging to the petitioner which were impounded under seal in the office of the Clerk of the District Court of the United States for the Southern District of New York under the order granted in the suit wherein Perlman Rim Corporation was the plaintiff and the Firestone Tire & Rubber Company was the defendant, or by the use of said exhibits by said United States Attorney before the Grand Jury of the United States in an inquiry by it into certain alleged violations of Section 125 of the United States Criminal Code claimed to have been committed by the petitioner."

POINTS.

I.

If there is doubt as to whether a case should be brought up on appeal or by writ of error it may be brought up by both modes, and this Court, when it comes to examine the case, will determine by which of them it is properly brought up and proceed accordingly.

Hurst v. *Hollingsworth, 94 U. S. 111; 100 U. S. 100.*

Plymouth Mining Co. v. *Amador Canal Co., 118 U. S. 264.*

Kenaday v. *Sinnott, 179 U. S. 606.*

Lockman v. *Lang, 132 Fed. Rep. 1.*

II.

Irrespective of the title to the proceeding brought to this Court, it is an application by Perlman to restrain the United States Attorney from seizing and using his papers and effects as evidence against him in a proceeding before a Grand Jury of the United States, and the proceeding has been so regarded by the United States Attorney.

The suit of *Perlman Rim Corporation* v. *Firestone Tire & Rubber Company* was dismissed on June 11, 1917 (*Rec. p. 22*). By the decree of dismissal the exhibits belonging to Perlman were impounded and deposited with the Clerk of the Court, under seal. So long as they were thus impounded and were only to be used for the purpose set forth in the decree we will assume that Perlman could not have interfered (*Ex parte Uppercu, 239 U. S. 435*). But when the United States Attorney undertook to acquire possession of these papers and effects, which were sealed and impounded for the special purpose indicated in the decree of the Court, and sought to use them as evidence against Perlman, their owner, before the Grand Jury of the United States, on a criminal charge against him, the latter, in order to prevent such unlawful and unconstitutional use, had no alternative but to apply by petition to the Court in whose possession these papers and effects were, for the purpose of restraining the United States Attorney from taking possession of such papers and effects

and from making unlawful use of them. Perlman had not been served with notice of the application made by the United States Attorney. He was not a party to the action. The application made by Perlman was, in effect, to annul, so far as he was concerned and for the protection of his personal rights, the order granted to the United States Attorney and to prevent the latter from removing from these exhibits the seal of the Court and taking them out of its possession and using them as the basis of a criminal proceeding against him.

Surely, in order to enable Perlman to make the application for the protection of his interests, it was not necessary that he should be a party to the suit of *Perlman Rim Corporation* v. *Firestone Tire & Rubber Company.* In fact, it was just because he was not a party to that suit that he insisted upon his constitutional right of protection against the violation of the guaranties of the Fourth and Fifth Amendments.

Nor is it necessary to regard his application as an attempted intervention in that suit. It was a proceeding entirely independent of the suit. That was only referred to because the order impounding his papers and effects had been made in the suit. For all practical purposes the title was of no possible importance. He presented a petition which might as well have remained without a title.

On the strength of this petition an order to show cause was issued by the Court to the United States Attorney. The latter appeared and litigated the application upon its merits. No objection was made on the ground of jurisdiction, or because neither Perlman nor the United States Attorney was a party to the equity suit; nor did

the Court render judgment on any such ground. The denial of Perlman's application was on the merits. The matter litigated was, as to whether or not the proposed use of Perlman's papers and effects was in violation of his constitutional rights. Certainly Perlman had a personal interest in the subject-matter of the litigation which he thus initiated for the safeguarding of his rights. He adopted the most direct, simple and expeditious method of procuring an adjudication with respect to them.

The cases cited by the Solicitor General have no application here.

In *Smith* v. *Indiana*, *191 U. S. 138*, a public officer of Indiana, who had no personal interest in a litigation which related to the constitutionality of a State statute, sought to sue out a writ of error to this Court, purely in the interest of third parties, after judgment had been rendered against him by the highest court of the State. It was held that, having no personal interest, he could not invoke the jurisdiction of this Court.

McCandless v. *Pratt*, *211 U. S. 437*, was a similar case. There it was held that a writ of error would not lie to review a judgment of the Supreme Court of Hawaii dismissing the bill in a suit brought by a taxpayer to enjoin the land commissioner from an alleged unauthorized use of public lands, it not appearing that the complainant would be personally injured by the threatened use. There, again, the party seeking to confer jurisdiction on this Court had no personal interest in the matter litigated. Here, however, the interest of Perlman in the matter sought to be litigated is vital and obvious.

In *Ex Parte Leaf Tobacco Board of Trade, 222 U. S. 578,* the petitioners, who sought the vacation of the decree in the case of *United States* v. *American Tobacco Company* by writs of mandamus, prohibition and certiorari, were not parties to the record and judgment which they were seeking to annul and overthrow. The Circuit Court of the United States had refused to permit them to become parties to the record, and the refusal of the Court was held not reviewable, especially since the petitioners' interest was not as here direct, but merely of a general nature and the act of the Court which was assailed had been accepted by the parties to the record. Here the parties to the record had no interest in the matter as to which Perlman sought an adjudication.

Nor has *Louisiana* v. *Jack, 244 U. S. 397,* any application here. It was there held that, generally speaking, the authority of a court to make new parties to a suit, especially after decree, rests in its sound discretion, and that a judgment may not be reviewed by one who is not a party, or privy to the record.

So far as the present case is concerned, Perlman is a party to the record, and was so recognized by the United States Attorney and by the Court below. To say that he cannot review the order of the Court which was adverse to him, merely because it has been entitled in a suit which has been dismissed, is to pursue a shadow and to lose sight of the substance.

It is well settled that any person may appeal or bring error if he was a party to an action or proceeding below, either originally or because subsequently made a party, or if he is a party

or privy to the judgment, order or decree complained of. Perlman and the United States Attorney were both parties to the order of which the former complains, by which the relief sought by him is denied. The order so shows upon its face.

Ex parte Southern Alabama R. R. Co., 95 U. S. 221.
The M. Burns v. *Reynolds, 9 Wall. 237.*
Savannah v. *Jesup, 106 U. S. 563.*
Hobart v. *Hobart, 86 N. Y. 636, 637.*
Tuttle v. *Claflin, 88 Fed. Rep. 122.*

Even though one is not a party to a suit or proceeding, if he is treated as such his right to appeal exists.

Ex parte Cutting, 94 U. S. 14.
Ex parte Cockcroft, 104 U. S. 578.

In the first of these cases Chief Justice Waite said:

"We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus in *Myers* v. *Fenn, 5 Wall. 205,* 'the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;' and in *Harrison* v. *Nixon, 9 Pet. 491,* 'inquiries were made as to the respective claims, as asked for, and 'as to all parties who were claimants before the court by bill, petition, or otherwise, their complaint, petition, and proceedings were dismissed.' So, in *Ogilvie* v. *Knox*

Ins. Co., 2 Black, 539, petitions were filed by certain creditors praying to be made parties, and that a receiver might be appointed, which was done; and in *Bronson* v. *LaCrosse R. R. Co., 2 Wall, 304,* certain stockholders in a corporation were permitted to appear in a cause to which the corporation was a party, and present their several claims by answer in the name of the corporation; but this afterwards having been found to be irregular, the answers were considered 'rather by indulgence than a matter of strict right as the answer of the individual stockholders.' Upon the same principle, it was held in *Railroad Co.* v. *Bradleys, 7 Wall. 755,* that where an appeal had been prayed for, and subsequently an appeal bond, approved by one of the judges, had been filed in the court, it would be inferred that an appeal had been allowed, although there was no express order to that effect in the record.

"From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; *and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party.*"

Among other cases similar to the present in which appeals have been permitted may be instanced the following:

In *Marion National Bank* v. *Abell, 88 Ky. 428,* an appeal was allowed from an order which required the appellant to produce his private books for inspection.

In *Matter of Ehrich* v. *Root, 134 App. Div. 432,* an appeal was allowed from an order for the examination of a safe deposit box held by a judgment debtor and a third person.

A purchaser at a foreclosure sale has been held to acquire such an interest in the property sold that he may appeal from an order setting aside or refusing to confirm or confirming a sale over his objection.

Kneeland v. *American Loan Co., 136 U. S. 89.*
Butterfield v. *Usher, 91 U. S. 246.*

A person is aggrieved when a judgment, decree or order operates prejudicially and directly upon his personal rights, even though he be not a party to the action, or even though the order complained of was made after judgment has been rendered in the action.

Thus in *The Farmers' Loan and Trust Company, Petitioner, 129 U. S. 206,* after a decree of foreclosure of a mortgage upon the property of a railroad company, an order was made that the receiver of the mortgaged property might borrow money and issue certificates therefor, which were to be a first lien upon it. It was held that an appeal would lie from such order to this Court.

In *Williams* v. *Morgan, 111 U. S. 684,* it was held that the holder of railroad bonds secured by a mortgage under foreclosure, had such an interest in the amount of the trustee's compensation as entitled him to appeal from a decree of the Circuit Court in a suit for the foreclosure of a railroad mortgage which fixed the compensation to be paid to the trustee under the mortgage from the fund realized from the sale.

In *Central Trust Co.* v. *Grant Locomotive Works, 135 U. S. 207,* it was held that a decree in a suit for the foreclosure of a railroad mort-

gage that the claim by a creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just and entitled to priority over the debts secured by the mortgage, could be brought to this Court by appeal, the matter being distinct from the general subject of the litigation.

In *Gumbel* v. *Pitkin, 113 U. S. 545*, it was held that when a third party intervenes in a pending suit to claim property in the custody of a marshal by virtue of a writ of attachment rendered therein, a judgment dismissing his intervention is final as to that issue, as is also one distributing the proceeds of the property to other parties, and is reviewable.

In *Bessette* v. *W. B. Conkey Co., 194 U. S. 324*, it was held that if a person adjudged in contempt and fined therefor is not a party to the suit in which the order is made, he can review the order by writ of error.

III.

The contention that this is an attempt to determine the guilt or innocence of Perlman by piecemeal, is without foundation.

The purpose of this proceeding is to protect Perlman against an unconstitutional invasion of his rights of property and his personal liberty. The fact that such invasion, if successful, may result in his indictment, does not convert this into an attempt to review a step in a criminal proceeding.

According to the contention of the Solicitor General, one whose papers and effects are sought to be wrongfully seized for the purpose of using them in a contemplated criminal proceeding, cannot appeal to this Court for the protection of his rights until after he had been indicted as a result of the violation of the rights guaranteed to him by the Constitution and has been tried and convicted by means of testimony thus unlawfully secured. In other words he must sit silently by, without using any preventive measures to secure himself against the threatened seizure of his property and the invasion of his liberty by unlawful means. That the rule is to the contrary will presently be shown. The importance of such an appeal is demonstrated by a comparison of the decisions in *Adams vs. New York, 192 U. S. 585* and *Weeks* v. *U. S., 232 U. S. 383.*

The cases relied upon by the Government do not sustain the proposition in support of which they are cited.

In *McLish* v. *Roff, 141 U. S. 661*, the decision sought to be reviewed was not a final order or judgment. The authorities cited under Point II show that the decision which is here sought to be reviewed is final in its essential nature. Perlman's petition was denied on its merits. It was adjudged that he could not restrain the United States Attorney from seizing his papers and effects and using them as evidence against him. The order made finally terminated the proceeding which he instituted. There was no direction to plead over. There was nothing more that could be done in the proceeding.

In *Covington* v. *Covington First National Bank, 185 U. S. 270*, matters within the pleadings in the

cause were left undetermined by the Court of Claims and the cause was retained for the purpose of thereafter passing upon them and for the entry of a further decree thereon. Hence the decree entered in the lower court was not final and not reviewable in this Court.

In the present case, however, there was nothing left to be determined with respect to the matter presented by the petition. That was decided as a finality. There has as yet been no indictment. It is threatened, but the papers and effects belonging to Perlman which he is seeking to keep out of the hands of the United States Attorney, and which the latter insists upon using for the purpose of procuring an indictment have not yet become available for that purpose because of the supersedeas granted on the appeal and writ of error allowed herein. Hence this is not a case where fragments of a litigation are brought here by successive appeals. The entire controversy so far as it has existed and as it still exists, was judicially ended so far as the District Court is concerned when that court made its order denying Perlman's petition.

Nor is this case like *Heike* v. *United States, 217 U. S. 423.* There the plaintiff in error was indicted for a violation of the Customs Law of the United States. He appeared and filed a special plea in bar claiming immunity from prosecution under an Act of Congress. The plea was decided in favor of the Government and Heike was granted the privilege of pleading over. He thereupon entered a plea of not guilty, and the case was set for trial. He then sought to review the judgment rendered against him on his plea. Clearly that was not a final judgment. The criminal case was still pend-

ing, the main issues were still to be tried, the judgment on the plea was merely interlocutory. Here there is no issue to be tried. The only issue thus far existing between Perlman and the Government has been decided.

Philadelphia & Reading R. R. Co. v. *United States, 244 U. S. 644,* in so far as the facts can be learned, is understood to be similar in character to the other cases cited. The decision sought to be reviewed lacked the element of finality.

IV.

Even though Perlman's exhibits were impounded in the office of the Clerk of the District Court, the legal title and constructive possession remained in him, the Clerk being a mere bailee.

The Court of Appeals of New York has, in two cases decided that the title of exhibits produced by a witness on the trial of an action remains unaffected by an order impounding them.

Read v. *Marine Bank* (*136 N. Y. 454*).
Read v. *Brayton* (*143 N. Y. 342*).

In the first of these cases the plaintiff sued for the amount of certificates issued by the defendant. The plaintiff was not in possession of the certificates. They were brought to court by an executor, as a witness, and were upon the court's order, taken from the witness and impounded with its clerk. On appeal it was con-

cluded that the certificates were, while with the Court's clerk, constructively in the possession of the witness from whom they were taken, Judge Maynard saying (p. 462):

"The action of the court in summarily depriving the witness of the custody of the certificates, and impounding them pursuant to its direction, cannot affect the legal rights of the parties. *They are still constructively in the possession of the executor,* and the order of the court requiring him to deposit them with the clerk cannot be made to perform the functions of a judgment and execution in an action of replevin."

The plaintiff in *Read* v. *Marine Bank* (supra), thereafter brought suit against Brayton, the court clerk, with whom the certificates had been impounded, and insisted that he had a right to replevy the certificates, so that he could upon the re-trial of the Marine Bank case be enabled to surrender them to the defendant. For the clerk it was argued that replevin would not lie because the plaintiff had then neither the title nor the right to possession of the certificates. This was held to be untenable. The effect of the court's order was thus stated by Chief Judge Andrews (143 N. Y. p. 346):

"The direction of the trial judge, that the certificates should be retained by the clerk until the further order of the court, was a *summary assumption of authority* and clothed the clerk with no immunity from liability to respond in an action by the true owner to recover the certificates."

At page 347 the opinion continues:

"The direction of the court made at the trial of the *Marine Bank* case, committing the certificates to the custody of the then clerk, was not

made in the course of any contest between the rival claimants of the certificates. The question of title was not being tried as between them. It was involved in the issue made between the plaintiff and the bank. The estate of the plaintiff's sister was not bound by any adjudication of title made in that action. Her husband brought the certificate into court under compulsion of a subpoena. He could not lawfully be deprived of the *possession* of the certificates by a summary order of the judge. The order as against him was a nullity and it was a nullity also so far as it tended to deprive the plaintiff of his right to bring an action in replevin against the clerk or any other person in possession of the certificates".

The Court of Appeals then determined that the order directing the impounding of the exhibits was *"a summary assumption of authority", which did not affect the legal rights of the parties; that the clerk's possession was the possession of the person who produced the exhibits and that they were constructively in the possession of the witness who thus produced them.*

Our position here, is in exact accord with that conclusion. We maintain that the order of the District Court, pursuant to which Perlman's exhibits were impounded was *an assumption of authority* with respect to which he was not heard. The cause in which the exhibits were produced and impounded did not involve the trial of the title to or the right to the possession of the exhibits. The Clerk of the District Court who now holds them, claims no title to them and though in his custody they continue to be constructively in Perlman's possession and cannot, therefore, be used against him in a criminal proceeding without his consent.

Ex parte Uppercu, 239 U. S. 435, involved the right of an interested party to have documents in the custody of the Court and placed under seal produced as evidence. The action in which the documents were required was one for the recovery from the petitioner by another of a part of the money received by the former for services rendered. The right to secure such documents was affirmed, but the opinion of Mr. Justice Holmes contains this important qualification:

"So long as the object physically exists, any one needing it as evidence at a trial has the right to call for it *unless some exception is shown to the general rule. We discover none here. Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been as against the public at large.* But as the custodian could not obey the summons of a magistrate to produce the documents without encountering the command of his immediate superior, the orderly course is to obtain a remission of that command from the source from which it came—a remission which in our opinion it is the duty of the judge to grant."

So tender are the courts in the protection afforded to the owners of books and papers against unwarrantable interference even by the adverse party to a suit with their right of privacy, that in cases where books have been deposited in the Master's office for inspection, with the parts thereof which did not relate to the matter in controversy sealed up, it has been held to be a contempt of court for the adverse party to break open the parts so sealed.

Diaz v. *Merle, 2 Paige Ch. 493.*
Titus v. *Cortelyou, 1 Barb. 444.*

V.

The proposed use by the United States Attorney before the Grand Jury of Perlman's exhibits as the basis for an indictment against him, constitutes an unreasonable seizure and the making of him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments.

The Fourth Amendment guarantees security *to all people* in their papers and effects against unreasonable seizure and the Fifth Amendment protects every person from being compelled, in any criminal case, to be a witness against himself. These guaranties against unreasonable seizures and of being compelled to be a witness in a criminal case have so often been considered together in the decisions, that pursuing the course of authority we shall likewise treat together both guaranties as applied to the facts disclosed by the record. They have been carefully considered and enforced in

Boyd v. *United States, 116 U. S. 616.*
Weeks v. *United States, 232 U. S. 383.*
Hale v. *Henkel, 201 U. S. 43.*
United States v. *Wong Quong Wong, 94 Fed. 832.*
New Jersey v. *McHill, 192 Fed. 586.*
United States v. *Mills, 185 Fed. 318.*
United States v. *Abrams, 230 Fed. Rep. 313.*
Counselman v. *Hitchcock, 142 U. S. 547.*

In *Weeks* v. *United States* (*supra*), the most recent of these decisions, police officers of the State

of Missouri entered the defendant's home while he was absent and took therefrom certain lottery tickets and letters. Before the trial of the indictment returned against the defendant, he made application for a direction that all papers taken from his home be returned to him. The court directed the return of some of the papers and refused to direct the return of others of the papers seized. The latter were used against him on the trial of the indictment. This Court held that the refusal to return the papers was error. Mr. Justice Day, said (*pp. 391 to 393*):

"The effect of the Fourth Amendment is to put the Courts of the United States and Federal officials in the exercise of their power and authority under limitations and restraints as to the exercise of such power and authority and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures, under the guise of the law. This protection reaches all alike, whether accused of crime or not, *and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.* The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

"What then is the present case? Before answering that inquiry specifically, it may be well, by a process of exclusion, to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English

and American laws to search the person of the accused when legally arrested to discover and seize the fruits and evidences of crime. This right has been uniformly maintained in many cases. [Citing authorities.] Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained, of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused. The case, in the aspect in which we are dealing with it, involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters as well as other property. * * *

"*If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.*

"The efforts of the court and their officials to bring the guilty of punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

The opinion then considers various of the authorities bearing on the subject under consideration and proceeds (*pp. 396, 397*):

"The Government also relies upon *Hale* v. *Henkel, 201 U. S. 43,* in which the previous cases of *Boyd* v. *The United States* (supra); *Adams* v. *United States* (supra); *Interstate Commerce Commission* v. *Baird, 194 U. S. 25* and *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, are reviewed, and where in it was held that a *subpoena duces tecum* requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies located in different parts of the United States, was an unreasonable search and seizure within the Fourth Amendment, and it was there stated that (201 U. S. 76) *"an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law and a seizure contemplates a forcible disposition of the owner, still, as we held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection."*

The opinion concludes (*p. 398*) thus:

"We, therefore, reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. • • •

"The record shows that what they (the policemen) did by way of arrest and search was done before the finding of the indictment in the Federal Court,

under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. *Its limitations reach the Federal Government and its agencies.*"

In United States v. *Mills,* 185 Fed. Rep. 318, Judge Lacombe was called on to determine the propriety of a petition which asked that the United States Marshal and District Attorney return certain books and papers to the defendant. The defendant had been indicted for conspiracy to defraud the United States in connection with the importation of merchandise and a warrant was issued and pursuant to it the Marshal seized the defendant's books and papers which covered his entire business including records which related to the charge against the defendant. The court held that the seizure was improper. The District Attorney and the Marshal were directed to surrender the books and papers seized, in spite of the insistence of the District Attorney that the books and papers showed the commission by the defendant of offenses against the United States. The learned Court said:

"It may be highly desirable from the point of view of a prosecuting officer that some such comprehensive seizure of the person's books and papers should be had; the trial of an offense charged may be thus facilitated and it may be easier to discover that the same person has been guilty of other similar offenses. It may promote the ends of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authori-

ty to organized society. Opinions will differ as to which is the wiser public policy. But whatever may be one's individual opinion, it is difficult to say how a subordinate Federal Court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court, in *Boyd* v. *United States* (116 U. S. 616) remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in which it has been referred to, do not indicate that the practice followed in this case should be approved."

In *Boyd* v. *United States, 116 U. S. 618,* the Court had under consideration the validity of an Act of Congress which authorized a court of the United States on motion of the Government attorney to require a person charged with a penalty or forfeiture under the Revenue Laws to produce in court his books, papers and records. The defendant produced his records and claimed that he was thereby compelled to furnish evidence against himself in a criminal proceeding and that the production was also an unwarranted seizure in violation of the Fourth and Fifth Amendments to the Constitution. His contention was sustained. In the course of the opinion this Court cited with approval Lord Camden's decision in *Entick* v. *Carrington,* 19 Howell's State Trials 1029, Mr. Justice Bradley saying (*p. 630*):

"The principles laid down in this opinon affect the very essence of constitutional liberty and security. They reach further than the concrete form of a case thus before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employes of the sanctity of a man's home and the privacies of life. *It is not the breaking of his doors and the rummaging of his drawers,* that consti-

tutes the essence of the offence, but it is the invasion of the indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of the sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

At page 633 the opinion continues:

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself" which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

Earlier in the opinion occurs the following pertinent passage (*p. 622*):

"It is true that certain aggravating incidents of actual search and seizure, such as forcible entry

into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. *It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be;* because it is a material ingredient and effects the sole object and purpose of a search and seizure."

Perlman occupies a better position than did Boyd for he came into court originally as a witness in a cause to which he was not a party. The plaintiff, on whose behalf Perlman gave testimony, offered Perlman's exhibits in evidence. The suit was discontinued and Perlman's property was impounded but for a special purpose only. His papers and effects, though so impounded were to be kept under seal. They were taken into custody solely for the advantage of parties to the suit in which the decree was made and their privies. They were not seized for any other purpose. As soon as Perlman learned that it was proposed to seize them for use in a criminal proceeding sought to be instituted against him by the United States Attorney he protested and filed his petition for the protection of his right and invoked the Constitution to shield himself from the invasion of his rights without his consent. His property thus unlawfully sought to be taken into the possession of the United States Attorney is now about to be used in an attempt to fasten upon him the charge that he committed some offense or offenses against the laws of the United States.

In *United States* v. *Wong Quong Wong* (*supra*), the defendant had been ordered to be deported. He delivered his personal letters to one of the Government officers, and these were sought to be used with the object of establishing the commission of a crime by him. The use of the letters for that purpose was held unwarranted. The court decided that the use by the Government officials of the letters after the defendant interposed objection to their use constituted "a seizure and compulsory production of a man's private papers and was equivalent to compelling the defendant to be a witness against himself, and was prohibited by the Fourth and Fifth Amendments to the Constitution."

In *United States* v. *Abrams* (*supra*), the defendants imported merchandise from a foreign country. Two government officers came to their place of business and asked for the delivery to them of certain of their papers and records. The defendants surrendered the papers to the Government officials and the papers were later made the subject of an inquiry set on foot to prove that they had committed an offense against the laws of the United States. They then made application for a return of the papers and in support of his decision granting it Judge Howe wrote:

"Do the same reasons and rule apply to obtaining from a defendant papers which contain evidence of a crime as would apply in obtaining an oral admission of crime from him? The same reasons and rule should and do apply and the fact that the evidence thus obtained is written makes no difference. The defendant's constitutional rights are as much violated in one case as in the other. The taking of the papers from this defendant without his consent was also a seizure of them that was unreasonable and contrary to

the spirit of the Fourth Amendment. U. S. *v.* Wong Quong Wong, 94 Fed. 832; Weeks *v.* U. S., 232 U. S. 383.

"The right of this court to order a return of papers in the possession of the District Attorney and other officers of the court, which have been obtained by officers of the government, while acting under color of their office, is fully recognized and established in Weeks *v.* U. S. (*supra*), and the opinion therein by Mr. Justice Day is exhaustive on this subject and nothing appears to be necessary here, but to refer to it and follow it.

"Therefore, the conclusion is that the papers in question were taken from the defendants by officials of the United States, acting under color of their office in violation of the defendant's constitutional rights, and having made a seasonable application for their return, an order will be made that the District Attorney return them to the defendants forthwith."

In *Counselman* v. *Hitchcock* (*supra*), this Court said:

"It is an ancient principle of the law of evidence that a witness shall not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures. The relation of Counselman to the subject of inquiry before the Grand Jury as shown by the questions put to him in connection with the provisions of the Interstate Commerce Act, entitled him to invoke the protection of the Constitution.

"The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself; but its object is to insure that a person shall not be compelled when acting as a witness in any investigation to give testimony which may tend to show that he himself has committed a crime."

Here, Perlman as the *owner* of the exhibits, which the United States Attorney proposes to use before the Grand Jury in an inquiry for the determination as to whether he has committed an offense against the laws of the United States, asks for his constitutional protection. The exhibits were taken and are withheld from him by force and are sought to be used for a purpose other than that for which they were taken in the first instance, and in violation of the terms of the order impounding them. Their use before the Grand Jury in an investigation wherein he is a defendant, or in an investigation which is directed against him, is a use against which he is protesting vigorously, and would constitute a compulsory production of his papers and effects before the Grand Jury. Perlman would thus be forced to furnish evidence in a criminal proceeding against himself. Such use would also be an unlawful and unwarranted seizure and retention of his papers and records.

Ballman v. *Fagin, 200 U. S. 186.*
Ex Parte Chapman, 153 Fed. 371.
In re Kanter, 117 Fed. 356.
In re Hess, 134 Fed. 109.
Wilson v. *U. S., 221 U. S. 361.*
Foot v. *Buchanan, 113 Fed. 156.*
People v. *Forbes, 143 N. Y. 219.*
Lamsen v. *Boyden, 160 Ill. 613.*
Emery's Case, 107 Mass. 172.

The courts will not permit a violation of these constitutional rights either directly or indirectly. Thus in *McKnight* v. *United States, 115 Fed. Rep. 972,* the Circuit Court of Appeals for the Sixth Circuit, consisting of Judges Lurton, Day

and Severens, held that it was a violation of the immunity guaranteed by the Fifth Amendment to the Federal Constitution to permit a demand to be made upon a defendant in a criminal case, in the presence of a jury, to produce a paper containing incriminating evidence against himself. Relying on *Boyd* v. *United States, supra,* the Court speaking by Judge Day, declared that that decision left no room for doubt that the compulsory production of an incriminating document by the accused when on trial for a crime, constituted a compulsion that he testify against himself within the meaning of the Constitution.

This decision was followed in *People* v. *Gibson, 218 N. Y. 70* and *People* v. *Minkowitz, 220 N. Y. 399.*

In *People ex rel. Ferguson* v. *Reardon, 197 N. Y. 236,* the constitutionality of a statute which purported to authorize the compulsory general examination of a person suspected to have made transfers of stock, for the purpose of ascertaining whether if made, he had kept a record of them and paid taxes thereon as required by statute, was involved, and it was decided that such an act violated the provision of the State Constitution which declares that no person shall be compelled in any criminal case to be a witness against himself.

It will doubtless be argued on behalf of the Government, that this case comes within the rulings in *In re Harris, 221 U. S. 247* and *Johnson* v. *United States, 228 U. S. 457,* which permit the books of a bankrupt to be used against him in a criminal proceeding. There is no analogy between those cases and the present, since, after the appointment of the trustee in bankruptcy, the bankrupt is divested of the title to his books,

records and other property, and his trustee becomes their legal owner.

Section 70 of the Bankruptcy Law clearly indicates that such a change of title is effected by the adjudication. It provides:

"The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall * * * be vested, by operation of law, with the title of the bankrupt, as of the date he was adjudged bankrupt, to all * * * documents relating to his property."

It necessarily follows that, after the divestiture of title, the books which formerly belonged to the bankrupt are no longer his within the terms of the constitutional provision.

The decision in *Adams* v. *New York, 192 U. S. 585,* does not militate against our contention. That case was tried in the State court. The Fourth and Fifth Amendments to the Constitution of the United States were not therefore applicable. The documents there offered in evidence were in the possession of the prosecuting officer and were produced by him on the trial. No application such as is here made was presented by the accused to the court before trial. The question as to how they were obtained was, therefore, treated as a collateral issue which could not be raised on the trial of the indictment for the purpose of ascertaining how the possession of evidence otherwise competent had been secured.

In his opinion in *Weeks* v. *United States, supra,* Mr. Justice Day, after a thorough analysis of that decision, said (*p. 396*):

"It is therefore evident that the *Adams Case* affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the con-

stitutional amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant and on the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes."

Wheeler v. *United States, 226 U. S. 478,* like *Wilson* v. *United States, 221 U. S. 361,* on the authority of which it was decided, involved the right to reach by *subpoena duces tecum* the books of a corporation, as distinguished from the private books of an individual. The constitutional provision was held not to apply to corporate books, but the privilege of individuals against self-incrimination by the production of their own books and papers was clearly recognized.

VI.

There has been no waiver by Perlman of his right to prevent the use of the exhibits in a criminal investigation instituted against him.

(*a*) The claim of waiver based on the fact that the exhibits were used in Court by Perlman as a witness in the suit of *Perlman Rim Corporation* vs. *Firestone Fire & Rubber Company* overlooks the relation of the parties before the court. Perlman was not a party to the cause. Though he appeared as a witness and produced the exhibits they were so produced only in connection with the trial of the issues involved in the cause then on trial,—*a very limited purpose.* He at no

time surrendered the exhibits. They were taken from his possession solely for the purposes of that suit and the incidental protection of the rights of the parties thereto and their privies. He never parted with the ownership of them. When impounded it was expressly directed that they should be kept under the seal of the Court. That involved no public disclosure and abandonment. As shown under Point IV the Clerk was the bailee, and was charged as a depositary with the duty of safe-keeping. The legal rights of the owner were preserved.

(*b*) Hence the mere production of the papers and exhibits in court for the purpose of the trial then in progress was not a surrender of title or a consent that they might be used against the owner in a hostile criminal proceeding against him. The decisions considered under Point V

> *Boyd* v. *United States* (*supra*).
> *Weeks* v. *United States* (*supra*).
> *United States* v. *Mills* (*supra*).
> *United States* v. *Wong Quong Wong* (*supra*).
> *United States* v. *Abrams* (*supra*).

all lead to the irresistible conclusion that Perlman has the absolute right to insist as he does, that the exhibits, his property, shall not be used against him in such a proceeding. The exhibits, the use of which it is sought to prevent, have not as yet reached the possession of the United States Attorney and in this respect the facts are much stronger in favor of Perlman than were the facts in the cases cited.

In all of them there had been an actual delivery and surrender to the Government officials, yet the

circumstances of the surrender or delivery were inquired into and where they were found to have been made *without the intent of permitting the books and papers to be used against their owners in a criminal proceeding* their use was forbidden, and the claim of waiver was overruled.

Thus in *United States* v. *Abrams* the Court found that the papers had been delivered upon the statement of the Government officials that the defendant would be better served by the delivery. The defendant abided by the advice so given but the Court said:

"None of these papers were voluntarily delivered to the officers. They were all obtained by the promise or threat that it would be better for the defendant if he gave Mr. Chandler what he wanted. This promise or threat influenced this defendant to part with his papers, and made their delivery involuntary in the eyes of the law. (Bram *v.* U. S., 168 U. S. 532) at page 542. The delivery of these papers may well be likened to a confession which is incompetent because not voluntarily made * * *"

So also in *United States* v. *Wong Quong Wong*, the Court determined that the mere naked retention of letters after objection by the defendant constituted *a seizure and compulsory production* in spite of the fact that the letters were voluntarily given to the Customs official. The letters were made the subject of inquiry as to the commission of crime by the defendant. He objected to their use for that purpose and the court held that there had been no waiver of his constitutional right and that their retention constituted a seizure and compulsory production of his papers. Said the Court:

"A seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, prohibited by the Fifth Amendment to the Constitution and is equally within the prohibition of the amendment in the prosecution of crime, or in a proceeding for a penalty of forfeiture."

In *Blum* vs. *State, 94 Md. 375,* the defendants had been indicted for conspiring to obtain moneys by means of false pretences. At the trial the Government offered in evidence the defendants' books and urged that they would establish that the defendants were guilty of the offenses with which they stood charged. The defendants objected to such use of the books and argued that to allow the books in evidence would, in effect, compel them to incriminate themselves, in violation of the guarantees contained in the Fourth and Fifth Amendments to the Constitution. The Government's attorney urged that the defendants had lost the right to claim that their books may not be used against them because they had voluntarily surrendered them by consenting to the appointment of a receiver of their property, and the surrender of the books to their receiver. The books were allowed in evidence and were used against the defendants. The Supreme Court of Maryland concluded that this constituted error, Judge Pearce saying:

"The principal and most serious ground of this exception is that this ruling virtually compelled the traversers to furnish evidence against themselves, in violation of the twenty-second article of the declaration of rights of this state, and the fourth and fifth amendments to the constitution of the United States. This objection the state seeks to meet by saying that the books had been

voluntarily turned over by the traversers to the receivers, and hence, if the books contained admissions, they could be used as any voluntary oral admission by the traversers could be used, and that, *as the proceeding for the appointment of receivers was by consent,* it could not be likened to one instituted by a hostile party for the express purpose of compelling the traversers to produce their books to be used against them. No authority was produced to sustain this position, though, if correct in itself, it needs none. But it is not correct to say that the books had been voluntarily turned over to the receivers for the purpose for which they are now sought to be used. If we should grant, for the sake of argument, all that may fairly be implied from the fact that the proceeding for receivers was by consent, the fact would remain that the books were surrendered under the order of the court, and, what is far more important, and, indeed, vital to the determination of the question, the further fact that it cannot for a moment be contended that the appointment of receivers contemplated any criminal proceeding against the traversers, and that they can therefore be held to have waived any constitutional privileges in their defense. The purpose of a receivership is the preservation and proper disposition of the subject of litigation. The receiver is not the representative of the state, nor even of the creditors, but the hand of the court, whose control is exerted for the benefit of those ultimately found entitled to the subject of litigation, and not to aid the state in making out a case in a criminal prosecution. It cannot, therefore, be claimed that the order appointing receivers could give, or was designed to give, any such power over the books as is here claimed, or that it could operate to change a rule of evidence in the administration of the criminal law. The effect of the order upon the admission of the books in this case can have no other or greater effect than an express order directed to the traversers, if there were no receivership, commanding them

to produce these books and papers, to be used in evidence for the state. The first inquiry, therefore, we are required to make, is whether the admission of these books and papers was a violation of any constitutional privilege of the traversers."

The Court then, on authority of *Boyd* vs. *United States,* ruled in the affirmative.

In *People* v. *Minkowitz, 220 N. Y. 399,* the defendant and one Silverman were indicted for burglary and receiving stolen property. They appeared by the same attorney and demanded separate trials. Silverman was tried first and convicted. The defendant appeared as a witness for Silverman upon his trial and produced a receipted bill purporting to show that the property claimed to have been stolen and found in his possession had been purchased by him. On the Silverman trial this receipted bill and other papers were offered and received in evidence. They were produced by the defendant from his possession and after the trial were returned to his attorney. In advance of the defendant's trial the District Attorney served a *subpoena duces tecum* upon his attorney requiring him to produce these papers, and during the trial, in the presence of the jury, he demanded their production. On the refusal to produce them the attorney was called as a witness and was compelled to testify that the exhibits were offered in evidence at the Silverman trial and had been returned to him, that he had been served with a notice to produce them in the then pending trial, and that he had not produced them. It was held that this constituted a violation of the defendant's constitutional rights notwithstanding the fact that these very exhibits had been produced by the defendant and by him permitted to be made exhibits on the Silverman trial.

VII.

It was within the power of the District Court as well as its duty to grant the relief for which Perlman prayed.

This was squarely decided in *Weeks* v. *United States* (*supra*), where in addition to the language already quoted from the opinion of Mr. Justice Day, he said (*p. 398*):

"The right of the court to deal with papers and documents in the possession of the District Attorney and other officers of the court and subject to its authority was recognized in Wise *v.* Henkel (220 U. S. 556). That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. Bishop on Criminal Procedure, Sec. 210, Rex *v.* Barnett, 3 C. & P. 600; Rex *vs.* Hensey, 7 C. & P. 447; United States *vs.* Mills, 185 Fed. Rep. 318; United States *v.* McHie, 194 Fed. Rep. 894, 898."

In *United States* v. *Mills, supra,* cited in the opinion of Mr. Justice Day in *Weeks* v. *United States, supra,* after the United States Marshal had, under a warrant, seized the books and papers of the defendants, a petition was filed in the United States Circuit Court for the Southern District of New York for instructions to the Marshal and District Attorney to return such books and papers to the defendants, and the application was granted.

In *United States* v. *McHie, 194 Fed. Rep. 894,* likewise cited with approval in Weeks *v. United States, supra,* the Capital Investment Company, which was not indicted and whose books had been

seized by special agents of the United States, presented an application to the Court for the return to it of the property thus seized. The application was granted. In the course of his opinion Judge Sanborn said (*p. 898*):

"It is further objected on the part of the Government that the Capital Investment Company has no standing in this case, no right to petition the Court for the restoration of its property so unlawfully seized. As to this point, it is enough to say that the property was seized under the claim of judicial process and thus brought under the control of the Court. It appears to be placed beyond the reach of a writ of replevin, or any other effective independent or plenary remedy. The courts are always open to petitions of this kind and the jurisdiction has been often exercised without question."

Wise v. *Mills, 220 U. S. 549,* and *Wise* v. *Henkel, 220 U. S. 556,* involved similar applications.

See also

Griffin v. *Thompson, 2 How. 244.*
In re Birdsong, 39 Fed. 599.
U. S. v. *Burr, 25 Fed. Cas. 41, at p. 48.*
Ex Parte Davos, 112 Fed. Cas. 1193.
Sec. 725, U. S. Rev. Stat.

VIII.

The Opinion of Judge Manton.

(*1.*) In his opinion Judge Manton sought to make a distinction between this case and those on which we rely, by calling attention to the fact that in most of them the officers of the law made search

and seizure of the books and papers which were sought to be used as evidence, within the sanctity of the homes of the persons accused of crime, and contends that the test by which the right to use the books and papers is to be determined is "the manner in which the property was obtained and not the mere fact that the accused has the title to the property or exhibits in question."

The authorities upon which we have relied do not, as we believe, lay down such a test. The constitutional provisions are just as applicable if the person whose books and papers are sought to be used were served with a *subpoena duces tecum* to produce them or were required by the Court, by an order served or by an oral direction made, either within or out of court, to deliver them to the prosecuting officer.

In like manner we urge that, so long as the books and papers sought to be used against one charged with crime continue to be his private property, his constitutional privilege with respect to them continues, even though they may not be in his physical possession. If, for instance, they are in the possession of his wife, of his attorney or of his employees, the constitutional safeguard protects him against their use without his consent. And so in the present case, when they are impounded under seal, and are in the custody of the clerk of the court as a bailee, they do not lose their character as the books and papers of the accused, who has the legal title to them, but continue immune within the meaning of the Constitution.

It has apparently been overlooked that the Fifth Amendment, as well as the Fourth Amendment, applies to this case, and that under the interpretation which both have received in *Boyd* v. *United*

States and *Weeks* v. *United States,* and other cases, the books and papers of one charged with crime can not be used in evidence against him, so long as he asserts his privilege and has not intentionally and unequivocally waived it.

(*2.*) It is also argued that, when Perlman's books and papers were impounded with the clerk of the court, there was no protest on his part. There was no occasion for a protest, because at that time there was nothing to indicate that a criminal proceeding would be instituted against him. The order of the court provided that the exhibits were to be "impounded and deposited with the clerk of this court, under seal, to be opened only by order of court on notice to each of the parties hereto." So long as they were thus kept deposited under seal and unopened, they were, so far as Perlman was concerned, as safe as though they had been retained by him in his own physical custody. It was only when the United States Attorney injected himself into the situation and procured an order that the clerk produce these exhibits before the grand jury and permit the United States Attorney and his assistants to have access to them at all reasonable times for the purpose of presenting them to the grand jury and of preparing for trial in the event that a true bill should be found by the grand jury, and that the United States Attorney might have such temporary custody of the exhibits as might be necessary for such purposes, that Perlman not only protested but petitioned the court that this interference with his constitutional rights should not be permitted.

(*3.*) Judge Manton also lays stress on the fact that Perlman abandoned his application for the

return of the exhibits. That does not, however, constitute a consent that they should be used against him. The use proposed to be made of them by the United States Attorney was all that concerned him at that time. In view of the fact that they had been impounded for the special purposes set forth in the decree of June 11, 1917 (*Record, pages 22-23*) and for the sole benefit of the parties to the then pending litigation, and their privies, it was deemed advisable not to complicate the determination of the simple proposition which was imminent—namely, the protection of his constitutional rights by insisting upon the immediate return of the exhibits into his physical custody. That did not involve a concession that these exhibits belonged to any one other than Perlman, or an abandonment on his part of his right of property in them or of his constitutional privilege.

(*4.*) Nor has the concluding paragraph of the opinion (*Rec. p. 31*) which seeks to draw a parallel between the proposition presented by this case and the seizure of a pistol taken from a slayer's hand and impounded for future use any bearing upon the question here involved. The distinction is clearly pointed out on page 392 of the opinion of Mr. Justice Day in *Weeks* vs. *United States* (*supra*).

IX.

The judgment of the District Court should be reversed with directions that the prayer of the petition be granted.

LOUIS MARSHALL,
A. A. SILBERBERG,
Counsel for Perlman.

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Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 752.

LOUIS H. PERLMAN,
Appellant and
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA.

Reply Memorandum for Appellant and Plaintiff-in-Error.

The shortness of the time allotted to oral argument and the desire to meet the various phases of the questions elicited, prompts us in asking the permission of the Court to submit for consideration the following comments.

I.

The Assistant Attorney General, in his argument on the facts, departed from the record and drew copiously on his imagination.

Perlman's papers and effects were impounded and placed under seal, to be opened only by order of Court, solely for the purposes of the equity suit and for the benefit of the parties to that litigation and their privies (*Rec., pp. 22, 23*). Perlman was merely a witness and not a party. There was no suggestion of a criminal proceeding.

II.

The fact that Perlman's papers and effects were placed into the custody of the Clerk by order of Court did not deprive Perlman of his right to invoke the Fourth and Fifth Amendments to the Constitution for his protection.

They could not have been obtained from him even by a search warrant without violation of his rights. That is expressly decided in *Weeks* v. *United States, 232 U. S. 397,* where, quoting from the opinion in *Hale* v. *Henkel, 201 U. S. 76,* Mr. Justice Day said:

"An order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case,* the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum,* against which the person, be he individual or corporation, is entitled to protection."

Although this principle has been modified with respect to corporations, it is believed to stand unshaken so far as individual rights are concerned.

Neither a search warrant nor a court order made without specific statutory sanction requiring the production of papers and effects can have greater potency than an order made pursuant to a statute. Such an order was dealt with in the *Boyd* case.

III.

In spite of the criticisms quoted by the Assistant Attorney General from *4 Wigmore on Evidence, Section 2264,* of the decision in *Boyd* vs. *United States,* its doctrine has been redeclared in *Weeks* v. *United States* and has been approved in numerous other Federal decisions.

The Fourth and Fifth Amendments, as applicable to a case of this character, are not only interrelated, but they are also interlocked.

IV.

The purpose of the United States Attorney to use Perlman's papers and effects in order to establish a charge of perjury, does not differentiate this case from *Boyd* v. *United States* or *Weeks* v. *United States.*

In the former the production of an invoice was required for the purpose of establishing a fraud upon the customs revenue laws, and an order for its production was made. In *Weeks* v. *United States* the crime charged was the use of the mails for the transportation of lottery tickets, and the papers seized included a number of lottery tickets and statements and letters with reference to the lottery.

The fact that a charge of perjury is sought to be made against Perlman and that Perlman's papers and effects which are sought to be taken out of his constructive possession are desired to be used for the purpose of establishing the charge, amounts to nothing more than an attempt to seize them for purpose of self-crimination. In fact the act does not differ from an attempt to call him as a witness for the purpose of proving the falsity of the testimony on which the charge of perjury is predicated.

This does not lead to the result that, where one is charged with perjury, proof of his oral testimony by those who heard it cannot be given, or that proof as to papers or effects bearing on the subject may not be made, so long as the papers or articles themselves are not taken from the actual or constructive possession of their owner and used for his incrimination. The difficulty of making proof of the charge without such papers and effects is no more a justification or excuse for striking down the constitutional guaranties in a case of perjury than it would be in a case of murder.

United States v. *McKnight, 115 Fed. Rep. 972* and *People* v. *Minkowitz, 220 N. Y. 399*, are excellent illustrations of how the courts can deal with such a problem without violation of the constitutional guaranties.

V.

The papers and effects of Perlman sought to be seized were not a part of any *corpus delicti* such as would justify their seizure.

The crime of perjury, if committed, consisted in the giving of false testimony under oath. The papers and effects which are attempted to be taken are at the most claimed to be evidentiary of the crime charged, in the same sense that the invoice in the *Boyd Case* and the lottery tickets and letters in the *Weeks Case* were evidentiary.

To say, therefore, that they are part of the *corpus delicti*, merely begs the question. If they may be seized pursuant to an order made at the instance of the United States Attorney when in the custody of the Clerk of the Court under seal, they may with equal right be taken out of a private safe deposit box or a desk or other place of safe keeping.

The difference between the seizure of the fruits of crime and papers and effects is recognized in *Weeks* v. *United States, 232 U. S. 392,* and in *Boyd* v. *United States, 116 U. S. 623.* In the latter Mr. Justice Bradley said:

"The search for and seizure of stolen or forfeited things or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.*"

Nor does this case come within the principle applicable to illegal traffic or with respect to the seizure of articles prohibited by law.

State v. *Burrows, 72 Me. 479.*
Commonwealth v. *Henderson, 140 Mass. 303.*
Evans v. *State, 106 Ga. 519.*
State v. *Edwards, 51 W. Va. 220.*

VI.

The authorities cited by the Government are inapplicable to this case.

(*a*) *Wise* v. *Mills, 220 U. S. 549,* which grew out of *United States* v. *Mills, 185 Fed. Rep. 318,* merely decided that although, in the latter case, a constitutional question was involved, an order punishing the United States Attorney for contempt because he disregarded the requirement of the Court that he return to Mills his books and papers, which had been seized, did not involve a constitutional question, and that therefore a writ of error from this Court to the Circuit Court of the United States would not lie. It is, therefore, really a decision in our favor.

(*b*) *In Burrell* v. *Montana, 194 U. S. 572,* it was merely held that a witness who testifies voluntarily cannot resist the effect of his testimony by the claim that he could not have been compelled to testify.

(*c*) *In Powers* v. *United States, 223 U. S. 303,* the prisoner was convicted of illegally manufacturing spirituous liquors. Before his indictment he voluntarily testified. On his trial his former testimony was admitted in evidence against him. It was in effect the same as though he had made the same statements voluntarily out of court.

(*d*) *In Tucker* v. *United States, 151 U. S. 164,* the prisoner was charged with murder. Before his trial he applied for the production of witnesses who, he testified, would prove that at the time of the commission of the crime he was in such a physical condition that he was incapable of de-

termining the quality of his acts. In his petition he set forth the facts in detail as to which he claimed such witnesses would give testimony. He did not call any of these witnesses on the trial. His petition was offered in evidence. It was sought to exclude it as a pleading under Section 860 of the United States Revised Statutes then in force. It was clearly not a pleading.

(*e*) *Holt* v. *United States, 218 U. S. 245,* involved the admissibility of the testimony of a witness to the effect that the accused had put on a blouse and that it fitted him, the purpose being to show that the garment belonged to the prisoner. There was no element of physical or moral compulsion to extort communications from the prisoner.

(*f*) The other cases cited are considered in our main brief.

Respectfully submitted,

LOUIS MARSHALL,
A. A. SILBERBERG,
Counsel for Perlman.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

LOUIS H. PERLMAN, APPELLANT AND PLAINTIFF IN ERROR, *v.* THE UNITED STATES. } No. 752.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT.

It is important at the very outset to grasp the precise setting of this case. Plaintiff in error and appellant, in an equity suit involving a patent, voluntarily testified as a witness, and supplemented his testimony with the exhibits forming the subject matter of these present proceedings. The equity proceedings were dismissed on motion of plaintiff pursuant to a stipulation under which the court ordered the minutes of the trial and all exhibits "impounded and deposited with the clerk of the court under seal, to be opened only by order of court on notice to each of the parties" thereto. (R., pp. 14 and 22.)

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Thereafter there was instituted before the Federal grand jury an inquiry into certain perjuries alleged to have been committed in the equity suit by Perlman, present plaintiff in error at bar. It became expedient to have the impounded exhibits produced before the grand jury, and doubtless deeming a subpœna *duces tecum* not a proper process to procure their production the United States attorney informed the court of the pendency of the grand jury inquiry, and asked for an order directing the clerk of the court, among other things, to produce the exhibits before the grand jury. The court granted the order. (R. 20.) On the day following Perlman filed a petition which, because of concessions made below, may be narrowed to asking that the United States attorney be enjoined from using or taking said exhibits, or presenting or permitting the same to be presented to any grand jury. (R., p. 25.) An order to show cause issued, and the United States attorney filed an affidavit alleging, among other things, that one perjury indictment had been returned against Perlman, and that the exhibits were essential to the further investigation by the grand jury of other perjuries by Perlman in the same suit, and for use at the trial if an indictment or indictments were returned. (R., p. 18.) After hearing counsel, the court denied Perlman's petition, and filed a supporting opinion. (R., pp. 24–31.) Aggrieved by that action, Perlman has brought the case to this court on appeal and writ of error, alleging

an invasion of his rights under the fourth and fifth amendments to the Constitution of the United States.

THE APPEAL AND WRIT OF ERROR SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

Conceiving that the judgment here sought to be reviewed lacked finality, the United States filed on a previous day of this term, a formal motion to dismiss, which this court postponed to the hearing on the merits. The attention of the court is now invited to that motion for a detailed statement of the grounds. It need here be only additionally urged that the present case can not escape the controlling effect of *Wise* v. *Mills*, 220 U. S. 549, 554. In that case while the writ of error was sued out from a judgment of contempt, this court determined that the question actually sought to be reviewed was the validity of an order directing the return of certain books and papers, the violation of which was the genesis of the contempt proceedings. As thus analyzed, the judgment was held to be not open to review, and this court dismissed the writ of error. Likewise in the instant case what is actually drawn in issue is the interlocutory order directing the clerk of the court to produce the exhibits.

ARGUMENT.

ASSUMING THAT THIS COURT HAS JURISDICTION, THE ORDER ATTACKED IS NOT OPEN TO CONSTITUTIONAL OBJECTION.

The bare statement of plaintiff in error's claim, reveals how destitute it is of merit. He is driven to the position that one who voluntarily testifies and produces exhibits in an equity case may, after the termination of that case, use the fourth and fifth amendments of the Constitution to prevent the use of the testimony and exhibits in a subsequent criminal case against him. If that contention should be upheld, no prosecution based upon perjured testimony in a judicial proceeding could be instituted, for evidentially no distinction can be drawn between oral testimony which concededly can be used, and exhibits. Each is introduced because of the story it tells concerning the issues of the case. The right to use one in a subsequent criminal case necessarily and legally carries with it the right to use the other.

Moreover, in the case at bar neither the exhibits nor the record of the oral testimony is in possession of plaintiff in error, and no order has been entered nor even sought directing him to produce either or both. As stated in *Holt* v. *United States*, 218 U. S. 245, 252:

> But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, * * *

The order here drawn in issue can not be twisted into an attempt to "extort" anything from plaintiff in error. Having let go the exhibits, so that they have become a part of the judicial records, he is not now in position to suppress the story they tell.

The principles herein laid down find abundant support in the following authorities:

Powers v. *United States*, 223 U. S. 303, 313, 314.
Ex parte Uppercu, 239 U. S. 435, 440.
Matter of Harris, 221, U. S. 274, 279.
Hale v. *Henkel*, 201 U. S. 43, 69, 70.
Johnson v. *United States*, 228 U. S. 457, 458, 459.
Tucker v. *United States*, 151 U. S. 164, 168.
Burrell v. *Montana*, 194 U. S. 572, 577.

It is respectfully submitted that the appeal and writ of error should be dismissed, or the judgment below affirmed.

WILLIAM C. FITTS,
Assistant Attorney General.

APRIL, 1918.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

LOUIS H. PERLMAN, APPELLANT AND plaintiff in error,
v.
THE UNITED STATES OF AMERICA. } No. 752

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO DISMISS.

Comes now the Solicitor General and respectfully moves the court to dismiss the appeal and writ of error herein on the following grounds:

1. Appellant has no interest in the subject matter of and is not a party to the equity suit out of which the appeal arises;

2. The order of the district court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court.

STATEMENT.

Perlman, appellant and plaintiff in error, was the inventor and owner of a patented device known as a "demountable rim." Subsequent to the issuance to him of letters patent for this device and in 1913, he

brought suit in the District Court of the United States for the Southern District of New York against the Standard Welding Company for infringement of his patent. The suit resulted in a decree in his favor (231 Fed. 453), which was affirmed by the Circuit Court of Appeals for the Second Circuit (231 Fed. 734). At the trial of this suit certain exhibits, the property of Perlman, were *voluntarily* offered in evidence by him and used in connection with the trial of the issues therein. (R. 1–3.)

Thereafter, and in March, 1916, Perlman assigned his patent to the Perlman Rim Corporation. In February, 1917, that corporation instituted in the same District Court a suit in equity against the Firestone Tire & Rubber Company for infringement of the patent. Perlman was not a party to this suit but appeared therein as a witness on behalf of the Perlman Rim Company. At the trial, the same exhibits which had been offered in evidence on behalf of Perlman in his suit against the Standard Welding Company, above referred to, were produced by him and *voluntarily* offered in evidence in conjunction with his testimony on behalf of the Perlman Rim Corporation. After final submission of the evidence adduced, on motion of the Perlman Rim Corporation, the District Court discontinued the suit but upon condition that the exhibits, including the exhibits herein involved, be impounded with the clerk of the court. (R. 3–5, 22–23.) At the time of the entrance of the order of discontinuance no claim was made by

Perlman that these exhibits were his personal property and should not be impounded.

Subsequent to the entrance of this order, the grand jury for the Southern District of New York had under investigation certain charges of perjury against Perlman alleged to have been committed by him in his testimony given on behalf of the Perlman Rim Company in its suit. It appears that some time after the date of this order and before July 19, 1917, the United States attorney for the Southern District of New York presented to the District Court a motion asking for an order of the court directing the clerk to produce before the grand jury the exhibits which had been impounded as hereinbefore related for use in connection with the investigation into the perjury charges against Perlman; that pursuant to such motion an order issued to the respective counsel for the plaintiff and defendant in the suit in which the exhibits had been impounded to show cause why the United States attorney should not have the possession and custody of these exhibits for use in connection with the grand jury investigation mentioned; that due service of said order was made on counsel for the plaintiff and defendant in said suit; that upon the hearing of said motion counsel for defendant did not appear and counsel for the plaintiff did not oppose the entry of an order granting to the United States attorney the possession and custody of the exhibits in question for the purposes suggested; and that on July 18, 1917, the motion of the United States attorney was

granted and an order entered accordingly. (R. 5–8, 20–21.)

On the following day, July 19, 1917, Perlman filed in the same District Court a petition praying for an order directing the attorneys for the plaintiff and defendant in the suit of the Perlman Rim Corporation against Firestone Tire & Rubber Company, and also the United States Attorney for the Southern District of New York, to show cause why an order should not issue directing the return to him of his exhibits and restraining the United States attorney from using the exhibits before the grand jury. Attached to the petition was a schedule of the exhibits which Perlman claimed to be his personal property and which he also claimed were not covered in his assignment of the patent to the Perlman Rim Corporation. The principal grounds of his petition were:

1. That the events leading to the procurement of the exhibits constituted an unreasonable seizure of his private papers and effects in violation of the fourth amendment of the Constitution; and

2. That the use of the exhibits for the purposes mentioned would be tantamount to compelling him to be a witness against himself in a criminal proceeding in violation of the fifth amendment to the Constitution. (R. 1–14.)

An order to show cause issued on the same day. (R. 14–15.)

Pending the disposition of this order and on July 20, 1917, the grand jury found an indictment against Perlman for perjury. (R. 18–19.)

Thereafter, and on September 22, 1917, the District Court, after consideration of all the pleadings together with an affidavit of Assistant United States Attorney Harper (R. 16–19) filed in opposition to Perlman's petition, and counsel for Perlman having withdrawn so much of his motion as related to the return to him of the exhibits involved and having limited his motion to the order that the United States Attorney be enjoined from using or taking said exhibits or presenting or permitting them to be presented to any United States grand jury, denied the motion of Perlman in all respects. (R. 24–31.) From this order an appeal to and writ of error from this court was allowed by the District Court. (R. 32–38.)

At this point it is appropriate to state that from an inspection of the record it is difficult to determine in what proceeding the petition of Perlman was intended to be filed; that is to say, whether the petition was intended as in the nature of an intervention in the equity suit between the Perlman Rim Corporation and the Firestone Tire & Rubber Company, or whether it was intended as a pleading in the criminal investigation. For instance, the petition, the exhibit filed therewith, and the rule to show cause issued pursuant thereto are entitled in the equity suit. (R. 1, 11, 14.) The decree impounding the exhibits is also entitled in that suit. (R. 22.) The affidavit of Assistant United States Attorney Harper filed in opposition to the petition is entitled in both the

equity suit and the criminal investigation. (R. 16.) The order of July 18, 1917, directing the clerk to produce the exhibits before the grand jury, is entitled in the criminal investigation. (R. 20.) The order of the court denying Perlman's motion for an injunctive order is entitled in both proceedings. (R. 24.) The opinion of the District Court rendered thereon is entitled in the equity suit. (R. 26.) The petition for an appeal is entitled in both proceedings. (R. 32.) The petition for a writ of error is entitled in both proceedings, and there appears another title, to wit, "Louis H. Perlman, plaintiff in Error, against United States of America, defendant in error." (R. 37.) The assignments of error are entitled in the equity suit and the criminal proceeding, but the additional title contained in the petition for the writ of error is eliminated. (R. 39.)

This confusion of titles, no doubt, prompted the adoption of both methods of obtaining review by this court with the hope that one or the other would lie, the appeal as the proper method in the equity suit and the writ of error as the proper method in the criminal proceeding. It is submitted, however, that neither will lie for the reasons hereinafter set forth.

ARGUMENT.

I.

THE APPEAL SHOULD BE DISMISSED.

The jurisdiction of this court can only be invoked by a party having a personal interest in the litigation (*Smith* v. *Indiana*, 191 U. S. 138, 148–150; *McCandless* v. *Pratt*, 211 U. S. 437, 443), and one who is not a party to a record and judgment is not entitled to an appeal (*Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581); and where it appears (as here) that an appeal is being prosecuted to this court by parties who have no personal interest in the litigation, or who are not parties to the record or judgment, it will be dismissed by this court.

Obviously, Perlman was at no time a party in interest in the equity suit of the Perlman Rim Corporation against the Firestone Tire & Rubber Company; nor was he made a party to the record and judgment in that suit. He was merely a witness. The bill of complaint in that suit was dismissed on June 11, 1917, long prior to the filing of the petition by Perlman, and the cause ended, it not appearing that any further proceedings were attempted by the real parties in interest. In these circumstances, this court can not review the record directly on appeal even though the petition of Perlman be considered as in the nature of an attempted intervention. See *Louisiana* v. *Jack*, 244 U. S. 397, 402.

II.

THE WRIT OF ERROR SHOULD BE DISMISSED.

If the method by writ of error was adopted as a writ of error in a criminal proceeding in the hope that a review of the order of the lower court denying the petition might be obtained, it is submitted that the order of the lower court is not a final order for the purpose of review by a direct writ of error from this court. Obviously, the order disposes of but one question arising in the criminal proceeding. The thing to be litigated, to wit, the right to convict Perlman of the offense which he was alleged to have committed in the equity suit, and for which an indictment was subsequently returned, has not been disposed of nor challenged by any appropriate pleading filed by him in the district court. The jurisdiction of the lower court as a Federal court to determine the guilt or innocence of Perlman is not involved. Aside from the foregoing, it is clear that this writ of error is an attempt to bring the criminal proceeding here by piecemeal, and that subsequent to the interlocutory order entered by the lower court Perlman should have entered his plea to the indictment and gone to trial, and thereby have brought the cause to final judgment, which is necessary before the questions attempted to be raised can be considered by this court. Under substantially similar circumstances, this court has dismissed many writs of error and appeals. See *McLish* v. *Roff*, 141 U. S. 661, 665; *Covington* v. *First*

National Bank, 185 U. S. 270, 277; *Heike* v. *United States*, 217 U. S. 423; *Philadelphia & Reading Railway Co.* v. *United States*, 244 U. S. 644.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1917.

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